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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED JANUARY 31, 1947.

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[fol. 4]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil No. 46C 275

Equitable Relief Sought

THE BALTIMORE and OHIO RAILROAD COMPANY, THE CHESAPEAKE and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, Plaintiffs,

vs.

THE CHICAGO RIVER and INDIANA RAILROAD COMPANY, CHICAGO Junction Railway Company, and The New York Central Railroad Company, Defendants

COMPLAINT—Filed February 12, 1946

Now come The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company and Wabash Railroad Company, plaintiffs, and [fol. 5] complain of The Chicago River and Indiana Railroad Company, Chicago Junction Railway Company, and The New York Central Railroad Company, defendants; and plaintiffs respectfully state to the Court:

1. Plaintiffs are corporations organized and existing by virtue of the laws of the following states respectively: The Baltimore and Ohio Railroad Company, Maryland; The Chesapeake and Ohio Railway Company, Virginia; Erie Railroad Company, New York; Grand Trunk Western Railroad Company, Michigan and Indiana; The New York, Chicago and St. Louis Railroad Company, New York, Penn-

slvania, Ohio, Indiana and Illinois; The Pennsylvania Railroad Company, Pennsylvania; Pere Marquette Railway Company, Michigan; Wabash Railroad Company, Ohio.

2. Plaintiffs respectively operate certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and are common carriers engaged in the transportation of property (including livestock) by railroad between Chicago, Illinois, and points in other states of the United States and as such are subject to Part I of the Interstate Commerce Act, Tit. 49, U. S. Code, Secs. 1-27.

3. Defendant, The Chicago River and Indiana Railroad Company (herein called the River Road), is a corporation organized and existing by virtue of the laws of the State of Illinois, and operates a line of railroad serving the Union Stock Yards, Chicago, Illinois, and connecting at Chicago, Illinois, with plaintiffs' respective lines of railroad and with the line of railroad of The New York Central Railroad Company, one of the defendants herein, referred to in paragraph 5 hereof, and is a common carrier engaged in the transportation of property (including livestock) by railroad (in connection with various connecting common [fol. 6] carriers by railroad, including plaintiffs and defendant, The New York Central Railroad Company, as their various routes may run) between said Union Stock Yards, Chicago, Illinois, and points in other states of the United States and as such is subject to Part I of the Interstate Commerce Act.

4. Defendant, Chicago Junction Railway Company (herein called the Junction), is a corporation organized and existing by virtue of the laws of the State of Illinois, and owns certain lines of railroad and leases certain other lines of railroad serving said Union Stock Yards, which lines (owned and leased) are leased to and operated by the River Road, and as such is subject to Part I of the Interstate Commerce Act.

5. Defendant, The New York Central Railroad Company (herein called the Central), is a corporation organized and existing by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and operates certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and is a common carrier engaged in the transportation of prop-

erty (including livestock) by railroad between such points and as such is subject to Part I of the Interstate Commerce Act.

6. This is a suit of a civil nature arising under paragraphs (18), (19) and (20) of section 1, paragraphs (2) and (4) of section 5, section 8, and section 9 of Part I of the Interstate Commerce Act for enforcement of an order of the Interstate Commerce Commission issued under and pursuant to paragraph (2) of section 5 of said Part I, for specific performance of a certain agreement arising out of said order, for damages for violation of said order and of said agreement, and to enjoin violation of paragraphs [fol. 7] (18) to (20) of section 1 and of paragraphs (2) and (4) of section 5 of said Part I. Jurisdiction of this Court is conferred by paragraph (12) of section 16 of Part I of the Interstate Commerce Act and by paragraph 8 of section 41 and by section 43 of Title 28, U. S. Code.

7. On May 16, 1922, and for many years prior thereto, in conformity with and pursuant to the traffic and operating relationships in effect between plaintiffs respectively and the Junction and the River Road, plaintiffs moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own power and crews from their respective lines, via their respective connections with the line of the River Road, to places of loading on the line of the River Road in said Union Stock Yards and, after they had been loaded by shippers, moved said cars from said places of loading with their own power and crews over the line of the River Road, via its connections with their respective lines, to and over said lines as consigned and routed by the shippers. For the privilege of so moving said cars plaintiffs respectively, on and immediately prior to May 16, 1922, paid the River Road and the River Road accepted $1.00 per car, loaded and empty.

8. On December 28, 1920, the Central filed with the Interstate Commerce Commission (herein called the Commission) its application for approval, *inter alia*, of the following proposed transactions:

"(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;

"(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity;"

[fol. 8] the proceeding on which application was known and described on the docket of the Commission as *Chicago Junction Case*, Finance Docket No. 1165. On May 16, 1922, the Commission made and entered a report and order in said proceeding, which are reported in 71 I. C. C. at pages 631-650, a copy of which, marked Exhibit A, is attached to this complaint and by this reference made a part hereof.

By said report and order the Commission approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows (71 I. C. C. p. 650):

"That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive."

The conditions so referred to included the following condition (71 I. C. C. p. 639):

"3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

After having enumerated the foregoing conditions in said report, the Commission made the following finding (71 I. C. C. p. 641):

[fol. 9] "Subject to the observance of the above conditions, we find that the acquisition by the Central of

the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

Said report and order were duly served on defendants and each of them on May 18, 1922.

9. On May 19, 1922, pursuant to the approval and authorization granted in said order of May 16, 1922, the Central acquired control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000, and the River Road acquired control of the property (owned and leased) of the Junction by lease. Said control of the River Road by the Central and of the property of the Junction by the River Road has continued from that date down to the present time and is still in effect. By virtue of such acquisition of control on May 19, 1922, the Central, the Junction and the River Road became obligated to abide by the conditions enumerated in said report and order of May 16, 1922, and, by operation of law, an agreement came into effect between the Central, the Junction and the River Road on the one hand and plaintiffs and other common carriers by railroad similarly situated on the other hand to abide by said conditions.

10. On December 3, 1928, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case*, which report and order are reported in 150 I. C. C. at pages 32-38, a copy of which, marked Exhibit B, is attached to this complaint and by this reference made a part hereof. By said report on further hearing and order the Commission amended condition 14 of its report and order of May 16, 1922. Said report on further hearing and order were duly served on defendants and each [fol. 10] of them on the 14th day of December, 1928. As so amended said report and order of May 16, 1922, are still in full force and effect.

11. On January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain proceeding then pending in said Court *entitled The Baltimore & Ohio Railroad Company et al. v. United States of America et al.*, In equity No. 3427, to which proceeding all of the plaintiffs herein or their respective predecessors in interest and all of the defendants

herein were parties, entered a final decree, copy of which, marked Exhibit C, is attached hereto and by this reference made a part hereof. By said decree said Court found and decreed with respect to the Commission's said order of May 16, 1922, as follows:

> "and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties."

12. From May 19, 1922, to the present time the Central has had and now has control of the traffic and operating relationships existing between the Junction and the River Road on the one hand and plaintiffs respectively on the other hand.

13. On or about January 25, 1946, notwithstanding their having become obligated and having agreed to abide by the conditions enumerated in said report and order of May 16, 1922, as amended, the Central and the River Road notified plaintiffs that on and after February 1, 1946, plaintiffs would not be permitted to continue to move stock cars as set forth in paragraph 7 hereof and that such cars, when destined to places of loading on the line of the River Road [fol. 11] in said Union Stock Yards, would be moved by the power and crews of the River Road from points of interchange with plaintiffs respectively on the line of the River Road to such places of loading and, after they had been loaded at such places of loading by shippers, would be moved thence by the power and crews of the River Road to points of interchange with plaintiffs respectively on the line of the River Road, and that at such points they would be delivered by the River Road to plaintiffs respectively, and that, upon the taking effect on February 1, 1946, of the aforesaid change in traffic and operating relationships, instead of the charge of $1.00 per car, loaded and empty, theretofore paid by plaintiffs respectively to the River Road and accepted by it in full payment for the right to move such cars as described in paragraph 7 hereof, the River Road would demand and exact from plaintiffs respectively $12.96 per outbound loaded car as a division of

the joint through rates on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via plaintiffs' respective lines, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945.

14. After having been notified on or about January 25, 1946, as alleged in paragraph 13 hereof, plaintiffs and each of them made written protest to the Central and the River Road objecting to the change in traffic and operating relationships between the Junction and the River Road on the one hand and plaintiffs on the other hand, referred to in paragraph 13 hereof, and demanding that the traffic and operating relationships theretofore in effect be continued.

15. Pursuant to the notification referred to in paragraph 13 hereof, on and at all times since February 1, 1946, the Central and the River Road have caused the employees of the River Road to fail and refuse and the employees of [fol. 12] the River Road have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at loading places on the line of the River Road in said Union Stock Yards and to move said cars from said loading places in accordance with the traffic and operating relationships between the Junction and the River Road on the one hand and plaintiffs respectively on the other hand theretofore in effect, and have required plaintiffs' respective crews to place empty stock cars in an interchange yard on the line of the River Road which yard is used by plaintiffs respectively and the River Road for the interchange of cars, and have required plaintiffs respectively to receive such cars, after the same had been loaded by shippers, at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in said Union Stock Yards and, after having been there loaded by shippers, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. At all times on and since February 1, 1946, the Central and the River Road have failed and refused and still continue to fail and refuse to permit plaintiffs to move stock cars as set forth in paragraph 7 hereof.

16. The movement of stock cars on the line of the River Road as required by the Central and the River Road on and since February 1, 1946, does not involve fewer hours of service by the power and crews of plaintiffs respectively than such movement of said cars as performed respectively prior to February 1, 1946.

17. The action of the Central and the River Road, referred to in paragraph 15 hereof, constituted and constitutes a violation of the Commission's said order of May 16, [fol. 13] 1922, as amended, and of the agreement of the Central, the Junction and the River Road arising out of said order, and of paragraphs (18) to (20) of section 1 and of paragraphs (2) and (4) of section 5 of Part I of the Interstate Commerce Act.

18. Said Union Stock Yards is the largest livestock market and the largest shipping point of livestock in the world and plaintiffs are and have been for many years the principal carriers engaged in the transportation of livestock therefrom to points in the United States east and southeast of Chicago, and plaintiffs have spent large sums in advertising and publicising their said service and in creating and maintaining good will towards the same on the part of shippers and receivers thereof and other persons interested in such transportation.

19. The change in traffic and operating relationships between the River Road and plaintiffs respectively, referred to in paragraph 15 hereof, has had and has and will have the effect of delaying the placing of empty stock cars furnished by plaintiffs respectively for loading at loading points on the line of the River Road in said Union Stock Yards and of delaying the movement of such cars after they have been loaded from such points of loading to points of interchange with plaintiffs' respective lines, with the result that the movement of outbound livestock other than hogs and sheep and other shipments of livestock of every kind moving in the same trains therewith from said Union Stock Yards over plaintiffs' respective lines has been substantially delayed; and some such shipments, as a result of such delay, will require unloading for rest, water and feeding in addition to such unloading as they would otherwise have required in order to avoid violation of the so-called 28-hour law (Title 45, U. S. Code, Secs. 71-74); and said

delays in the placement of such cars for loading and in the [fol. 14] movement of loaded cars and said prospective additional unloading for rest, water and feeding will result in substantial delays in the delivery at destination of such shipments and other shipments of livestock of every kind moving in the same trains therewith whereby some of said shipments will miss the markets for which they would have arrived in time had not such change in traffic and operating relationships been made.

20. By changing the traffic and operating relationships existing between the River Road and plaintiffs respectively prior to February 1, 1946, as alleged in paragraph 15 hereof, the Central and the River Road have deprived plaintiffs and each of them of the trackage rights over the line of the River Road to said Union Stock Yards which they theretofore enjoyed and of direct access to said Union Stock Yards for the transportation of livestock other than hogs and sheep from said Union Stock Yards to points in the United States east and southeast of Chicago, as a result whereof plaintiffs have been, are and will be prevented from dealing directly with the shippers of such livestock in placing and opening empty cars for loading, and in hauling out loaded cars, and have been, are and will be made dependent upon the Central and the River Road for the performance of said services for such shippers, with the result that plaintiffs are no longer able to see to the maintenance of such services at the high level of efficiency which was reached and maintained during the time when plaintiffs rendered said services directly, and as a further result of which plaintiffs are no longer able themselves to protect and enhance the good will which, prior to February 1, 1946, they had created among shippers and receivers of livestock other than hogs and sheep.

21. By reason of the unlawful acts set forth in this complaint plaintiffs respectively have been damaged and are being further damaged each day that said unlawful acts continue by reason of having been deprived of the track- [fol. 15] age rights over the line of the River Road which they formerly enjoyed as aforesaid and of direct access to said Union Stock Yards, and by reason of the aforesaid delays in the outbound movement from said Union Stock Yards, via plaintiffs' respective lines, of livestock and the

additional stops for rest, water and feeding, and the delays in arrival at destination and the missing of markets which will result therefrom, the value of plaintiffs' service in the transportation of livestock as aforesaid has been and will be greatly reduced and plaintiffs' good will has been and will be greatly damaged and injured. The money amounts of said damage to plaintiffs respectively are impossible of ascertainment.

22. By reason of the unlawful acts set forth in this complaint, in addition to the damage suffered by plaintiffs as alleged in paragraph 21 hereof, plaintiffs respectively have been damaged and are being damaged and will continue to be damaged each day that said unlawful acts continue in the amount of the difference between $2.00 and $12.96 per loaded car of livestock other than hogs and sheep moving from said Union Stock Yards via plaintiffs' respective lines, which, based on the year 1944 (the last year for which figures are available), amounts in the aggregate to approximately $675.00 per day.

23. The unlawful acts set forth in this complaint will, if continued, result in irreparable injury to plaintiffs and their respective property in this, that it will be impossible to determine in money the amount of the aforesaid injury to the value of plaintiffs' said transportation service and to plaintiffs' good will. In consequence thereof plaintiffs are without an adequate remedy at law and are entitled, under paragraph (12) of section 16 of Part I of the Interstate Commerce Act, to a writ of injunction to restrain defendants from disobedience of said order of the Commission and to enjoin upon them obedience to the same; and [fol. 16] are entitled to the aid of a court of equity to force defendants to comply with said agreement arising out of said order of the Commission, and to enjoin the further violation by defendants of paragraphs (18) to (20) of section 1 and paragraphs (2) and (4) of section 5 of Part I of said Act; and are entitled to a temporary injunction pending the final hearing in this cause.

Wherefore, plaintiffs pray:

(1) that until the final hearing of this cause a preliminary injunction issue out of this Court after hearing, restraining and enjoining said defendants and each of

them, their respective officers, agents, representatives, servants, employees and successors, and all other persons in concert and participating with them from

(a) failing and neglecting to obey said order of the Commission of May 16, 1922, as amended;

(b) violating condition 3 of said order of the Commission of May 16, 1922, as amended;

(c) breaching their agreement to abide by condition 3 of said order of the Commission of May 16, 1922, as amended;

(d) failing and refusing to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of the River Road to points of loading on said line in said Union Stock Yards and, after such cars have been loaded, so to move the same from said points of loading over the line of the River Road to plaintiffs' respective lines;

and commanding said defendants to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of the River Road to points of loading in said Union Stock Yards and, after having been loaded, from said points over the line of the River Road to plaintiffs' respective lines;

[fol. 17] (2) that after final hearing said injunction be made permanent;

(3) that judgment be entered for plaintiffs in the amounts in which they are found to have been damaged by the unlawful acts aforesaid after account stated; and

(4) that the Court grant such other and further relief as the plaintiffs may be entitled to in equity.

Dated at Chicago, Illinois, this 12th day of February, 1946.

The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St.

Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, (S.) by Ernest S. Ballard, their Attorney, 120 South La Salle Street, Chicago 3, Illinois.

(S.) Ernest S. Ballard, William F. Price, Pope & Ballard, 120 South La Salle Street, Chicago 3, Illinois, Randolph 6680, Attorneys for Plaintiffs.

[fols. 18-19] *Duly sworn to by J. M. Symes. Jurat omitted in printing.*

[fol. 20] EXHIBIT "A" TO COMPLAINT

Interstate Commerce Commission

Finance Docket No. 1165

Chicago Junction Case

Application of the New York Central Railroad Company for Approval of Purchase of Stock, Lease of Property, and Option to Purchase Stock or Property

Submitted April 5, 1922. Decided May 16, 1922

1. Acquisition by the New York Central Railroad Company of control of the Chicago River & Indiana Railroad Company, by the purchase of its capital stock, approved and authorized subject to certain conditions.

2. Acquisition by the Chicago River & Indiana Railroad Company of control of the Chicago Junction Railway by lease, approved and authorized subject to certain conditions.

3. Application of the New York Central Railroad Company for authority to purchase the capital stock or physical properties of the Chicago Junction Railway Company denied without prejudice to future proceedings.

Robert J. Crary and Sidney C. Murray for applicant.

Silas H. Strawn and Frederick C. Hack for Chicago Junction Railway Company and Chicago River & Indiana Railroad Company.

Luther M. Walter for intervening carriers.

Irving Herriott, Butler, Lamb, Foster & Pope, and E. S. Ballard for certain interveners.

C. G. Austin, Jr., for Belt Railway Company, and Walter L. Fisher for Chicago Railway Terminal Commission.

[fol. 21] REPORT OF THE COMMISSION

By the COMMISSION:

The New York Central Railroad Company, hereinafter termed the Central, a carrier by railroad subject to the interstate commerce act, on December 28, 1920, filed its application for approval of the following proposed transactions:

(*a*) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;

(*b*) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity;

(*c*) The granting to the Central by the Junction of an option to purchase all of the capital stock of the latter or all of the properties to be leased as last above set forth.

The application recites that it is filed pursuant to the provisions of paragraphs (18) to (22), inclusive, of section 1, and of paragraph (2) of section 5, of the interstate commerce act. No representations were made by any State authority for or against the granting of the application. Public hearings were held at Chicago and at Washington and all interested parties were given opportunity to be heard. At the opening of the hearing, interventions in opposition to the application were filed by the following trunk lines entering Chicago from the east and southeast: Baltimore & Ohio Railroad Company; Chesapeake & Ohio Railway Company; Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; Pennsylvania Railroad Company; Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and Wabash Railway Company. Two

groups of shippers also intervened, one in opposition to the application and the other taking a neutral position. In addition there were filed separate written indorsements of individual corporations and firms, comprising about 90 per [fol. 22] cent of the 400 shippers served by the Junction and the River Road, urging our approval of the proposed plan. About 30 of these indorsements were subsequently withdrawn. The Chicago Railway Terminal Commission was also represented during a portion of the hearings.

The record, which is voluminous, established the following facts: The territory served by the Junction and River Road lines is entirely within the so-called Chicago switching district, and is treated in the application as dividing naturally into five groups, of which two are of primary importance for the purposes of this proceeding, namely, the central manufacturing district and the stockyards group. The other three comprise the sections north from the stockyards to Fifteenth Street, east to Lake Michigan and southwest to Central Park Avenue, respectively, including what is known as the Kenwood manufacturing district. The Central now controls by stock ownership the Indiana Harbor Belt Railroad, hereinafter termed the Harbor Belt, which is located for the most part outside of Chicago and connects the Central main line with the River Road at Elsdon and with that road and the Junction at Forty-ninth and Oakley Streets and again with the latter line at Forty-ninth and Morgan Streets. The other eastern trunk lines, intervening in this proceeding and competing with the Central for line-haul traffic, connect with the terminal facilities afforded by the Junction and River Road either directly from their own rails or by means of other belt lines, namely, the Belt Railway of Chicago, controlled by a group of carriers, the Chicago & Western Indiana Railroad, likewise so controlled, and the Baltimore & Ohio Chicago Terminal Railway, owned by the Baltimore & Ohio Railroad. The Junction and River Road properties, the Elgin, Joliet & Eastern Railroad, and the Illinois & Northern Railroad comprise the only independently owned terminals in the Chicago switching district. The Junction and River Road handle traffic to and from all of the 23 trunk lines entering Chicago.

The nucleus of the present Junction system was constructed in 1865 by the stockyards interests, which oper-

ated the property up to 1887, all of the trunk lines entering [fol. 23] the yards for both inbound and outbound traffic. From 1887 to 1893 the lines were operated by a transfer association controlled by the carriers. The stockyards company resumed operation from 1893 to 1897, in which year the properties were leased to the Chicago & Indiana State Line Railroad Company for 50 years, and in 1898 the lines were merged with the Chicago, Hammond & Western Railroad Company under the corporate name of Chicago Junction Railway Company. In 1907 the Junction sold the Chicago, Hammond & Western properties to the Harbor Belt.

Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central manufacturing district, which as an institution has been in existence for about 15 years and has 180 industries, producing a tonnage of over 100,000 carloads per year and 100,000 tons per year of less-than-carload freight. This district is in the geographical center of the city and is capable of accommodating not less than 500 additional industries and of producing more than twice the present annual tonnage of freight.

The movement of live stock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic. In the case of dead carload freight inbound, the line-haul carrier places its loads in the Junction yards at Ashland Avenue, where they are picked up by Junction engines and crews and moved to the point of unloading. Outbound carloads are picked up by the Junction crews at team and industry tracks and moved to its Forty-ninth Street classification yards, then taken out and classified for destination by the line-haul carreirs, each of which has in such yards an appropriate number of tracks designated to receive its traffic. For outbound less-than-carload shipments the Junction maintains a union freight station at Fifteenth Street and Western Avenue, where any number of packages can be drayed by a shipper and billed to destination on as many different trunk lines to any point in the [fol. 24] United States or Canada. Such shipments are collected by the Junction in a car or cars for each carrier and

delivered to the proper track in the classification yards as in the case of car load freight. A trap-car service is also maintained. Dressed meats from Packingtown are handled through the yards in like manner, each packer looking after the cleaning and icing of its own empty cars at a convenient point on the Junction rails. The Junction performs no function as to routing of a shipment, either carload or less-than-carload, and if through inadvertence a shipment is offered without routing it is held for instructions. Each carrier makes regular scheduled trips to the classification yards to leave and pick up its own line-haul freight, the number of trips per day depending upon the volume of business handled by the individual carrier. Thus the Junction organization performs purely a switching service as to those movements, the charges therefor constituting a part of the through rates published by the line-haul carriers. The Junction lines also serve an important purpose in providing facilities on a trackage basis for the interchange of traffic passing through the Chicago gateway. However, with the growth of the industrial switching business, the increased density of traffic has produced such a congestion as to make it desirable to perform certain services at points farther out on the belt lines. Earnings of the Junction in the past have not been such as to permit the expansion of its facilities to meet the growing requirements of the district served, and this is true as to interchange as well as switching and team-track facilities.

The position of the Central and the grounds upon which it relies for the support of its application may be summarized as follows:

The Central lines are vitally in need of additional down-town terminals in Chicago, which it can not now build up for itself because of the preemption of real estate and the high level of land values, rendering the cost of new construction prohibitive. A terminal property must necessarily be constructed before, and not after, an industrial development takes place. The Junction and River Road properties have a strategic location which can not now be [Vol. 25] duplicated, and could not be reproduced at any price. To bring under a common control these properties and the Harbor Belt would greatly promote the public interest by providing the necessary "balance" between the inner industrial movement afforded by the former and the transfer, interchange, and classification facilities avail-

able and potential on the rails of the latter. The junction properties are incapable of expansion so as to afford adequate facilities for interchange and classification, since the district in which they lie is highly developed and intensively used, whereas the Harbor Belt has or can acquire additional space for the building of yards. The inner and outer properties are therefore complementary and in no sense competitive, but can only be operated to the best advantage by bringing them under common control. This expansion at outlying points would permit the inner group to extend further its team-track facilities and enable a more expeditious use of the less-than-carload facilities of the stockyards group. The gain to shippers on the Junction would be found in the greater accessibility of the outer-belt facilities of the Harbor Belt and the expansion of inner facilities made possible by the removal of outer-belt facilities from the inner district. Inbound traffic, for example, would be brought first to outer classification yards on the Harbor Belt and there made up into trains for the 12 districts served by the inner lines. Other services now performed by the Junction in the congested area would be performed on the outer belt, to the great relief of the present Junction facilities.

The intervening carriers contend, in effect, and offer proofs tending to show, that the plan is contrary to public interest because the Junction and River Road lines are now neutral and open to all carriers and shippers on equal terms; that the plan would substitute monopoly of these facilities for the present neutrality of operation, to preserve which the transportation act, 1920, was designed, as evidenced by paragraph (4) of section 3 of the interstate commerce act, as amended; that the live-stock market requires open operation of the facilities serving the stockyards, and the shippers in the district must have competi- [fol. 26] tive service by neutral terminals; that the car supply for the district can not and will not be handled fairly by the Junction if controlled by the Central; that the latter will be able by means of such control to divert a large volume of competitive line-haul traffic to its own rails, thereby causing the intervening carriers to lose earnings to such an extent as to necessitate advanced rates; and that such carriers have an equity in the properties by reason of having contributed to the Junction's earnings. They

offer to combine with the Central in a joint control of the properties on the basis of their fair value.

The group of shippers intervening in opposition express the belief that they will not, under the proposed plan, continue to enjoy existing routing privileges or receive equal service from all trunk lines entering Chicago, but will be forced to route over the Central as a matter of self-protection.

The second group of intervening shippers are desirous of preserving intact the present organization of the Junction and the same impartial service which they now enjoy and desire that the Central bind itself to accept certain conditions designed to insure that result.

The Chicago Railway Terminal Commission fears that the project may prove deterrent to the adoption of the city's plan, not yet formulated, for the unification and coordination of all Chicago terminals, the establishment of universal freight stations, and other measures which may hereafter be adopted to relieve congestion in the downtown shipping district, and would prefer to have the Junction and River Road properties remain neutral pending the outcome of its investigations and the adoption, by legislation or otherwise, of a comprehensive policy.

As to values, the Central offered proofs tending to show that the present cost of reproduction of the River Road properties exceeds $3,000,000. Deducting the funded unmatured debt of $891,428.57 as of the date of the application, would leave an equity, it is asserted, of more than $2,000,000, represented by the capital stock of the par value of $500,000, for which the Central proposes to pay $750,000. [fol. 27] Further proofs tend to show a present cost of reproduction for the Junction properties, including the value of its leases, of considerably more than $33,000,000, represented in the proposed plan by the capitalization at 6 per cent of the $2,000,000 rental.

Estimates were introduced showing separately the cost of reproduction and cost less depreciation of road and equipment and the land values of the properties. Reproduction cost new was obtained by applying to the several quantities, as per inventory of the Bureau of Valuation, an average price for the year 1914, and applying thereto a multiple averaging 2.26 times the 1914 price, to obtain the cost new as of 1920. To these results were added normal percentages for engineering, general expenditures, and in-

terest during construction, and depreciation was applied to the whole in accordance with methods approved by the Bureau of Valuation. Adding structural going-concern value, materials and supplies, and working capital, a grand total of over $18,000,000 was obtained as the value of the Junction road and equipment, except land, and the corresponding figure for the River Road was, by the same methods, placed at over $2,000,000. An elaborate study of land value was presented and analyzed at some length by experts in Chicago real-estate values the conclusion being that the lands of the Junction are valued in excess of $23,000,000 and those of the River Road at over $1,500,000. Further opinion evidence was given as to the commercial or market value of the properties from the standpoint of the Central and the additional worth of such properties to it because of the uses to which they can be devoted in developing the Central's traffic, the contention being that the value of the properties to the Central is greatly in excess of that value which may be assigned to them for rate-making purposes.

It appears that the investment cost of the Junction property is impossible of accurate statement, because no proper accounts were set up until 1905, and since that time, it is stated, various important items have failed to find their way into the investment in road and equipment on the company's books. The investment reported by the Junction in [fol. 28] 1920 for the purposes of the proceedings in *Ex parte 74* (*Increased Rates, 1920*, 58 I. C. C., 220), was slightly in excess of $6,000,000. There is also evidence that the Junction officials as late as 1919 considered it proper to claim a value for rate-making purposes of something over $17,500,000. Our Bureau of Valuation has not yet completed its tentative report on the properties pursuant to section 19a of the act.

Under all the circumstances it is not feasible to make a definite finding of value in this proceeding which shall be taken and accepted as a final judgment in the matter, and the conclusion herein reached renders such a finding unnecessary.

On all the facts of record it is concluded that for the purpose of this proceeding only we may accept the position of the Central that the market value of the properties to the Central and its affiliated companies at this time is such as

to justify the payment of a rental based on something more than the value for capitalization or rate-making purposes. That is by no means saying, however, that its figures are to be accepted as the basis for permanent capitalization or for rate-making, or that the Central is to be permitted to capitalize the intangible values by paying, through the River Road, permanent fixed charges on the basis of the market value claimed. Since the values are not at this time capable of definite settlement, it follows that such part of the application as relates to the purchase of the capital stock or the physical properties of the Junction will not be granted herein, but will be reserved for future treatment at such time as the Central may desire to renew its application in that respect, following the final determination of values under section 19a of the act.

It remains to discuss the disposition which should be made of those portions of the application which relate to the acquisition of the capital stock of the River Road by the Central and the proposed lease to the former of the properties of the Junction.

There are grave objections to an unconditional approval of the plan under consideration. Much testimony was ad- [fol. 29] duced at the hearings, and divergent opinions were expressed, as to the relative merits of cooperative, singly controlled, and independently controlled terminals. That discussion need not be reproduced here. The policies and plans of the city with respect to the general terminal situation have not yet fully developed, and it is obviously impossible for any one to determine at this time the ultimate goal which ought to be attained. It is believed, however, that pending final determination of future policies, the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation. This can be best accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the Central. The Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties. The stronger competition and the connection between the Junction properties and the Harbor Belt facilities which would thus be brought about, would not only insure to the shippers of the Junction the necessary

expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the city to another. It has been held that where such a transaction as the present one would clearly facilitate the movement of traffic through a highly congested district, the circumstances that other carriers would suffer a loss of revenue is not controlling. *People ex rel. New York Central R. R. Co.* v. *Public Service Commission*, 183 N. Y. S., 930.

There are in the record ample grounds for the belief that the Junction can not longer solve its problems without outside assistance. On the other hand, it is believed that the benefits pointed out by the Central can be made to accrue to the public by the consummation of the proposed plan. A prime factor in the situation is the circumstance that the [fol. 30] general policy on all terminals in Chicago is that of equal opportunity afforded to all connecting carriers irrespective of the ownership or control of a given terminal property by a single trunk line or by a group of trunk lines. Traffic is handled for all carriers in the same way and on the same terms, so that a shipper on terminals owned by a single carrier has the utmost freedom in routing via competing lines and apparently receives the same measure of service whether his shipment moves over the lines of the owning carrier or those of a competitor. Those shippers who appeared in opposition express the fear that they will not be accorded like treatment by the Central. The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face value, especially since the contrary policy would clearly be against the self-interest of the Central, in that it would thereby lose the good will of the shipper. There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end.

But we are not prepared, in any event, to authorize the consummation of the plan without making assurance doubly sure by the imposition of certain conditions. Those conditions relate partly to the method of operation of the property and partly to the treatment of the transaction by the corporations participating therein. Among the number are those matters enumerated by the shippers who have asked an approval of the plan with the understanding that certain agreements already made by the Central will be adhered to. Other matters were suggested by the group of shippers who took a neutral attitude at the hearing, such matters being agreed to on the record by the applicant; and still others suggest themselves from the standpoint of an administrative body, as necessary in order to safeguard the public interest in the future. Stated concretely, the conditions are:

[fol. 31] 1. The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.

2. The present neutrality of handling traffic inbound and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.

3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central.

4. For the purpose of assessment of switching charges, the Junction and River Road shall continue to be treated as a single line to the same extent as at present, so that the carrying out of this plan will not in and of itself result in increasing the charge to any shipper for the service.

5. Subject to subsisting car-service regulations, cars made empty on the rails of the Junction and River Road

shall be available for outbound loading in the same manner and to the same extent as at present irrespective of routing.

6. Whenever additional cars are required for outbound loading, because of inadequacy of available car supply on the Junction and River Road rails at any given time, for any cause, orders for such additional cars shall be accepted from the shipper by the local Junction organization and by it promptly transmitted to the designated trunk line without discrimination, and all cars ordered by and delivered to the Junction shall be promptly moved to the shippers by the Junction without discrimination on account of proposed routing.

7. The Junction shall accept, handle, and deliver all cars inbound and outbound, loaded and empty, without dis- [fol. 32] crimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

8. The National Code of Demurrage Rules, as in effect from time to time, including the average agreement, shall be applied by the Junction and River Road to each industry served by either of them on all inbound and outbound cars irrespective of what carrier or carriers may be interested in the line haul.

9. Shippers served by the Junction and River Road shall be entitled to the same basis of switching charges as prevails in the Chicago switching district generally, and no attempt shall be made to establish any different basis of local or connecting-line switching charges that that which prevails in the Chicago switching district generally for the same or similar service under substantially similar conditions.

10. No change shall be sought in the present method of basing rates to and from the Chicago switching district as a single point upon which rates are now based without regard to the character of the movement in and out of such district.

11. Present trap-car arrangements for the transfer of less-than-carload freight at the Junction union station, at connecting-line freight stations, or at connecting points

reached by the Junction and River Road, shall be continued, but this condition shall not apply to routine changes in management and operation of trap-car service.

12. Continuance of present operating arrangement on the Junction properties shall include the maintenance of existing shipping and billing arangements at the Junction union freight station, so far as such arrangements are within the control of the Junction.

13. The Junction shall, if ordered by us, establish station facilities for the receipt of inbound less-than-carload freight at a point convenient and accessible to shippers wishing to make use of the same, to which freight may be delivered by all trunk-line carriers, without discrimination, and there distributed through the medium of the Junction's operating force.

[fol. 33] 14. Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

15. The carrying out of the plan as authorized herein shall be taken to be without prejudice to the adoption of any plan or plans in the future by the city of Chicago, by us, or by any other public agency, for unified or coordinated terminals, and neither the Central, the River Road, nor the Junction shall urge the authority herein given or the situation resulting therefrom as a ground for opposition to such plan or plans of said city, our plans, or those of any other public agency.

16. Nothing contained in this authorization shall be taken as permitting the River Road and Junction properties to be considered as a part of a single system with that of the Central for any of the purposes of section 15a or section 20a of the act.

17. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them,

as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose.

Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.

An order will be issued in accordance with the foregoing.

DANIELS, *Commissioner*, concurring:

I concur in the result reached in this report. I am, however, of opinion that the report should recognize explicitly that the application should have been entertained under sec- [fol. 34] tion 1, paragraph 18, of the act; and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered.

I am authorized to state that Commissioner Campbell concurs in the views expressed above.

HALL, Commissioner, concur-ing in part:

If the powers of Congress are not adequate to deal with such a terminal situation as will result under the authorization here given, then they are not adequate to deal with the terminal situations which exist today in Chicago and many another city. The Pennsylvania, the Baltimore & Ohio, the North Western, for example, already have what the New York Central seeks in the way of lodgment, and, if it could not be dislodged, neither can they. If the powers of Congress are adequate, but those granted to this commission as its agency are not, additional grant will be needed to meet existing conditions quite as much as to meet those which would result from the proposed acquisition.

No solution of the Chicago terminal problem can be suggested which will not have to take into account the existing terminals of the 23 line-haul carriers serving that city as well as "independent" terminals like the Junction. Seven of the 23, competitors of the New York Central, are marshaled in opposition to what it seeks, but ready to join it in the acquisition and leave out the rest of the 23. The "neutrality" of the Junction will not be changed in respect of live stock, which constitutes about 35 per cent of its

traffic. That has long been moved by each line-haul carrier to and from the stock-yards over the Junction's rails and, as appears in the majority report, "all parties concede that that is the only practical method of handling that traffic." Acquisition by the New York Central may ultimately facilitate rather than impede solution by more nearly equalizing the respective contributions of the line-haul carriers to the looked-for "joint and cooperative terminal."

The facts warrant grant of authority without elaboration of conditions. Those imposed in the majority report seem to me vain, perhaps harmful, except Nos. 15 and 16, which [fol. 35] should suffice if any are needed. I refrain from discussing the points of law. They will doubtless be settled by competent authority when occasion arises.

MEYER, Commissioner, dissenting:

The Chicago Junction Railway and Chicago River & Indiana Railroad are now open terminals. According to the uncontradicted testimony the Junction is the best type of open terminal to be found anywhere in the United States. What the majority approves in this report may in the future restrict the use of and close these terminals to competitors on equal terms. That is why I can not concur in the report.

To be sure there are conditions in the order the intended purpose of which is to prevent the imposition of restrictive features in the use of the Junction Railway. I am not satisfied that those conditions can be adequately enforced, or that their enforcement, because of the necessary inflexibility when they are imposed as conditions, will not unduly hamper operations within the terminal.

The future of our railroads and the character of their service to the public depend largely upon the manner in which terminals will be used. For many years cases involving the use of terminal properties by competitive railroads have been before us. The one insuperable obstacle to the free use of terminals as reflected in these cases has been the insistence on the part of the owning carriers upon their technical legal rights, as a result of which much injustice has been done to individual shippers and the free development of industry hampered. Railroad companies seem to take the view that the public use of terminal properties is more limited than the use of their other properties

devoted to the public service. The familiar distinctions between and differences in treatment of competitive and noncompetitive traffic, short-hauling, and other considerations, have been invoked in order to defeat what in my judgment the commerce of this country clearly requires. My personal views regarding certain features of terminal situations are perhaps more fully reflected in our report in the [fol. 36] *Peoria & Pekin Union case*, 26 I. C. C., 226, than in some of the other terminal cases, and need not be restated here. Among the leading cases on this subject the following may be mentioned: *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I. C. C., 310, April 5, 1910; *Manufacturers Ry. Co.* v. *St. L., I. M. & S. Ry. Co.*, 21 I. C. C., 304, June 21, 1911; *Merchants & Manufacturers Asso.* v. *P. R. R.*, 23 I. C. C., 474, May 14, 1912; *Morris Iron Co.* v. *B. & O. R. R. Co.*, 26 I. C. C., 240, December 2, 1912; *St. Louis, Springfield & Peoria R. R.* v. *P. & P. U. Ry. Co.*, 26 I. C. C., 226. February 10, 1913; *Manufacturers Railway Co.* v. *St. L., I. M. & S. Ry. Co.*, 28 I. C. C., 93, June 21, 1913; *Buffalo, Rochester & Pittsburgh Ry.* v. *Pennsylvania Co.*, 29 I. C. C., 114, December 3, 1913; *Waverly Oil Works Co.* v. *P. R. R. Co.*, 28 I. C. C., 621, December 3, 1913; *Traffic Bureau of Nashville, Tenn.*, v. *L. & N. R. R. Co.*, 28 I. C. C., 538, December 9, 1913; *Manufacturers Railway Co.* v. *St. L., I. M. & S. Ry. Co.*, 32 I. C. C., 100, July 10, 1914; *City of Nashville* v. *L. & N. R. R. Co.*, 33 I. C. C., 76, February 1, 1915; *Louisville Board of Trade* v. *L. & N. R. R. Co.*, 40 I. C. C., 679, July 5, 1916; *Richmond Chamber of Commerce* v. *S. A. L. Ry.*, 44 I. C. C., 455, April 28, 1917; *The New York Harbor case*, 47 I. C. C., 643, December 17, 1917.

In the instant case the New York Central management has manifested a commendable departure from the old theories of restrictive and selfish use of railroad terminals by their owners, but although the applicants have agreed to conditions which, if made effective, would prevent in large part the ancient evils, there is and can be no adequate guaranty that through the imposition of switching charges, car supply, hours of interchange, and other means the commerce of Chicago tributary to the Junction may not some day be burdened by the assertion of individual rights of the owners acquired through this proceeding.

Before we can grant authority, under the transportation act, 1920, for this transaction it must appear affirmatively

that the public interest will be thereby promoted. It is not sufficient to show that no detrimental effects will follow. The sole advantages pointed out by the majority report [fol. 37] are the acquisition of additional downtown terminals in Chicago by the Central, the operation of the Junction and Harbor Belt as a unit with the corollary opportunity for expansion upon the outer belt, and the direct financial backing of a proprietary trunk line. The present terminals are open to the Central on the same terms as are afforded other roads. The prophesied advantages of unified operation are vague and indefinite, potential rather than actual. No complaint has been made as to present service or facilities, and there is evidence that the existing properties are not now used to full capacity. The remoteness of the hinted advantages which are the necessary basis for our approval is indicated by the terms of the order which eliminate from the transaction all prospect of present public gain by rigid maintenance of the existing times and places of interchange, and compulsory adherence to existing operating conditions.

The problem of terminals can not be solved in a year. It is a continuing one capable of solution only gradually by successive steps in the right direction in each locality. The present may prove to be a serious step in the wrong direction.

Commissioner Aitchison authorizes me to state his concurrence in this dissent.

EASTMAN, Commissioner, dissenting:

This proceeding has to do with a terminal railroad property in the city of Chicago serving the greatest market for live stock and packing-house products in the world and an industrial district already highly developed and capable of much expansion. For many years this property has been operated independently with financial profit to its owners and to the satisfaction of its trunk-line connections and of the shippers which it serves, and it is so operated at the present time.

It is now proposed, in effect, to transfer this property in perpetuity to one of its trunk-line connections, the New York Central, by means of a lease at a rental of $2,000,000 per year. We are asked to certify under paragraph (18) [fol. 38] of section 1 of the interstate commerce act that

public convenience and necessity require this transfer, and also to approve it under paragraph (2) of section 5. There is nothing in either the report or order of the majority that purports to be or is a certificate of public convenience and necessity and it must be assumed, therefore, that the order is based on paragraph (2) of section 5. In my judgment such a transfer as is contemplated is subject to paragraph 6 rather than paragraph (2) of section 5, and can not lawfully be approved by us until a plan of consolidation has been adopted under paragraph 5 of that section. However, in view of the conclusion which I have reached with respect to the merits of what is proposed, I shall not undertake to discuss questions of law at this time.

The rental of $2,000,000 per year is equivalent to 6 per cent upon $33,333,333. There is nothing of record to show that the actual investment in this terminal property has been much in excess of $6,000,000 and it clearly appears that by far the greater part of the investment has been derived from surplus earnings. The compensation to be paid for the property is thus very high, and in itself is reason for scrutinizing the transaction with great care. I am not in accord with the theory that the right of railroads or other public-utility companies to a return, through the medium of charges for the service which they furnish, upon unearned increment in real estate values or upon property representing the investment of surplus earnings is unqualified or unlimited. In this instance it appears that the earnings of the property have been almost wholly derived from trackage or switching charges which have been paid or absorbed by the trunk-line connections. It follows that they have not been a matter of concern to shippers and that their reasonableness has not been tested.

The suggestion was made on argument that if owners of a property have an opportunity to dispose of it on advantageous terms, it would be an invasion of their constitutional rights if we should refuse to permit the transaction to be consummated. The fallacy of the suggestion is obvious. Owners may have a constitutional right to sell if they can find a purchaser willing and able to [fol. 39] buy, but railroad corporations clearly have no constitutional right to buy. The question before us is not whether the owners of this terminal property may sell, but whether the New York Central may purchase. If public control had been exercised over similar purchases by the

New York, New Haven & Hartford, great economic waste might have been avoided. The suggestion that such control would have been an invasion of constitutional rights is not one that will appeal to the good sense of the community.

But I do not rest my dissent either upon questions of law or upon questions of price. A fundamental issue of policy is at stake. The proposed transaction is strongly urged by the New York Central and with equal energy condemned by the competing trunk lines. It is opposed by some of the interested shippers and favored, on paper at least, by more. To my mind, however, a most significant and important fact is the opposition of the Chicago Railway Terminal Commission, an official commission of the city of Chicago, created by ordinance and charged with the duty of studying the railway terminal situation, both passenger and freight, in that city.

We are here dealing with a problem which, in many of its aspects, is essentially local and for that reason, if for no other, the views of this Chicago Railway Terminal Commission would be entitled to great weight. They are the more persuasive, however, because they are the views of men of known reputation and ability who have made a study of the railway terminal situation, not only of Chicago, but of many of the more important cities of the United States, Canada, and Europe, and because they are views which in themselves have force because of their intrinsic merit.

The Chicago commission is impressed, as a result of its investigations, by the vast importance of the railway terminal problem in this country and the opportunities which its proper solution offers for the elimination of waste and the improvement of service. The following passages from its preliminary report indicate the trend and the basis of its views:

> With respect to terminal facilities and services, at [fol. 40] least, the advantages of competition seem negligible when compared with its disadvantages. * * *
>
> The complete application of the competitive system to railway freight terminals falls of its own weight. Each road can not secure and maintain terminal facilities covering the entire terminal area of such a city as Chicago. It can not secure, maintain, and operate adequate facilities in each and every section

or district within the metropolitan terminal area where important freight traffic is to be had. In many cases this is physically impracticable, and in many more cases it is financially impracticable. Nevertheless, the attempt is made—under existing methods—to cover as much as possible of the entire field by separate and competitive terminals, with the resultant complication of facilities, and a financial investment not justified by the revenue earned.

* * * In the terminal district of Chicago as a whole —and the same thing applies to other cities—the unnecessary complication of terminal facilities and operating costs is so extensive that it is appalling in its effect upon the railroads, the shippers and the public; and the future outlook along these lines is by many—in and out of railroad service—believed to be becoming worse and worse. The investments by railroads in unused or little used property to protect real or fancied competitive positions or interests, is also a source of great expense to the railroads and ultimately to the public—although not often fully realized as such. The interest on these investments is absorbed in the general interest charges on the entire property and is thus lost sight of as being an expense due to unproductive investments, nor is due allowance made for the natural accretion in the value of such property, which is often withheld from profitable use for considerable periods of time.

If the terminal situation were treated cooperatively instead of competitively, there would be an immediate simplification of the tangled network of tracks that now exist; the release for general commercial pur- [fol. 41] poses of much valuable property now held by railroads for present competitive purposes or prospective competitive needs; the reduction of operating costs in the terminal handling of freight and the increase of efficiency. To the public this would mean not only the improvement of the services to the shippers, but the reduction of the street congestion and the removal of existing obstacles to the growth and development of the city.

And by such reasoning it arrives at the following general conclusion:

> It is already clear, however, that the key to the solution of our railway terminal problem—with respect to freight as well as with respect to passengers—is to be found in the substitution of joint and cooperative terminals for separate and competitive terminals; this substitution to be brought about not by some sudden or drastic adoption and execution of a complete revolutionary plan covering the whole railway terminal situation, but by such steps as may be taken from time to time with due regard to financial and operating conditions. Certain important steps of this character undoubtedly can and should be taken at once or in the near future for the establishment of cooperative terminals and the readjustment of existing terminals to conform to correct principles of terminal development. *But the essential thing is that from now on no steps shall be taken in the opposite direction, thus creating unnecessary barriers to proper development in the future.*

In its opinion, the issue in this proceeding is "whether it will be more in the public interest to have the Chicago Junction Railway controlled by a single terminal agency controlling also the other terminal facilities within the Chicago terminal district, or to have the Chicago Junction Railway controlled by a single trunk line such as the New York Central Railroad. Or, rather, the issue is whether if the former be the better public policy the acquisition of the control of the Chicago Junction Rail- [fol. 42] way at this time by the New York Central Railroad will constitute an obstacle to the future adoption and development of the sounder public policy." The Chicago commission answers this latter question in the affirmative; but it asks and earnestly urges that for our own guidance and the guidance of the railroads and of the public we reach our own conclusions, before approving the transaction here proposed, as to the "principles of a sound and beneficial railway terminal policy to which future development should be made to conform," and decide this case accordingly.

In this connection it calls our attention to the following statement of former Chairman Clark of this commission

before the Committee on Interstate and Foreign Commerce of the House of Representatives in July, 1919:

> If I had my way I would begin this idea of merger and cooperation with the terminals, and I would provide, if I had my way and the direction of it, in every large commercial center for a terminal association or corporation which would be a separate entity. I would make it the terminal agency of all the roads that reach the place, operated as nearly as could be figured out at cost. Then the railroad serving that place would turn over the traffic destined to the place to this terminal agency and it would be delivered where the consignee wanted it delivered on any of the tracks. There would not be any question about closed or open terminals; there would be one terminal for all.
>
> *Mr. Rayburn:* You think that would be an efficient arrangement?
>
> *Mr. Clark:* I do, yes, sir.
>
> *Mr. Rayburn:* It would mean in all probability a saving?
>
> *Mr. Clark:* A great saving in expenditure, a great increase in efficiency and the elimination of endless friction.

It also directs our attention to the following passage from the report on consolidation of railways made to us by [fol. 43] William Z. Ripley and appearing in *Consolidation of Railroads*, 63 I. C. C., 455, at pages 483, 484:

> But whatever the cause for the existing situation, a practically universal demand of shippers is that they be able freely to exercise their routing rights by the provision of open terminals, both at the point of shipment and at destination. The right of route across country is impaired if the only possible delivery is at an inconvenient point. To put together railway lines on the map without having a constant regard to the possibility of free delivery or receipt at either end would indeed be futile. As to the particular means for accomplishment of this object—free and untrammeled utilization of terminals—there may well be difference of opinion. Conceivably, joint ownership and operation, as at St. Louis, may succeed in that environ-

ment, while reciprocal switching may satisfactorily answer the purpose as at Chicago. But, whatever the means adopted to this end, it is submitted that a *proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan.* No recommendation, therefore, as to particular terminal remedies is offered in this report. The subject technically is so involved, that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious at its intimate connection with consolidation. *The pending New York Central application to acquire the Chicago Junction Railway raises in itself almost all the possible aspects of terminal problems.* Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in section 1, paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. Possibly the assignment of terminal [fol. 44] properties might take place by means of leases based upon valuation by the Commission and at a rate fixed by the Commission as reasonable. This would permit the terminal companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owning these facilities, should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike. [Italics mine.]

The majority dismiss the plea of the Chicago commission with the statement that it is "obviously impossible for any one to determine at this time the ultimate goal which ought to be attained." Pending final determination of future policies, they believe that "the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation," and think that this can best be accomplished "by bringing the present neutral Junction properties into closer relation with a trunk line like the

Central." Nevertheless they are apparently sufficiently in doubt as to the good to be attained from this "continuance" of competition so that they feel it necessary to surround the transaction by 17 more or less complicated conditions which can only be enforced, if at all, by constant surveillance and policing.

I have little sympathy with this plan of conditions. Either the transaction should be approved, or it should be disapproved. If it is not so meritorious that it will yield good results in the natural course of events, it never can be made to do so by all manner of paper commandments. But, aside from this, I submit that what the majority are proposing is in no sense a "continuance of the competitive terminal situation," but rather an enlargement and extension of this situation. What has been neutral will cease to be neutral, and to that extent it will be more difficult to retrace our steps if we finally discover that "the ultimate goal which ought to be attained" is not competition but [fol. 45] cooperation. And the situation is in this respect the more serious in that we are here dealing with a terminal property serving exclusively the greatest market for live stock and packing-house products in the world. The transfer of such a property, now neutral, to the possession of a single trunk line is most assuredly no small or insignificant departure from a policy of terminal cooperation and coordination.

For my own part I do not believe that it is at present impossible to determine the "ultimate goal to be attained." If it is impossible, we can at least follow the best light that we now have, and certainly we ought not to delude ourselves into believing that we are maintaining the *status quo* when we are in fact countenancing a very radical and important step towards one possible ultimate goal and away from another. Moreover, I have no hesitation in expressing a conviction, based on such knowledge as I now have, that former Chairman Clark and the Chicago Railway Terminal Commission are right in believing that the ultimate goal is the "substitution of joint and cooperative terminals for separate and competitive terminals," and that the attainment of that goal would make possible far-reaching economies and improvements in service.

I agree also with the Chicago commission that the public benefits which the New York Central claims will flow from

the acquisition of the Junction property are either vague, uncertain, and illusory or quite possible of attainment without such acquisition. The record does not support the conclusion that there will be any public loss if the transaction is disapproved. In my opinion it will be an obstacle to the future proper solution of the Chicago terminal situation, will embarrass our determination of a plan of consolidation under section 5 of the interstate commerce act, will be contrary to the public interest, and ought not to be approved.

Commissioner Cox also dissents.

[fol. 46] ORDER

A hearing and investigation of the matters and things involved in this proceeding having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

It is further ordered, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized: *Provided*, That the right to prescribe the terms, methods, and character of securities, if any, which the New York Central Railroad Company may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana Railroad Company be, and it is hereby, reserved to the Interstate Commerce Commission: *And provided further*, That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive.

And it is further ordered, That said application, so far as it seeks authority to purchase the capital stock or the physical property of the Chicago Junction Railway Company, be, and the same is hereby, denied without prejudice to future proceedings.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 47] EXHIBIT "B" TO COMPLAINT

Interstate Commerce Commission

Finance Docket No. 1165

Chicago Junction Case

Submitted June 1, 1928. Decided December 3, 1928

Upon further hearing, condition numbered 14 in original report in this proceeding, 71 I. C. C. 631, 641, modified.

Robert J. Cary for Chicago River & Indiana Railroad Company and New York Central Railroad Company.

Mark W. Potter for Chicago Junction Railway Company.

Ernest S. Ballard, James Dale Thom, and Butler, Lamb, Foster & Pope for Harris Brothers Company, intervener.

Luther M. Walter for Pullman Couch Company, intervener.

Report of the Commission on Further Hearing

By the COMMISSION:

In our original report and order in this proceeding, issued May 16, 1922, 71 I. C. C. 631, we authorized the Chicago River & Indiana Railroad Company to lease the Chicago Junction Railway, and also authorized the New York Central Railroad Company to acquire control of the Chicago River & Indiana Railroad Company by purchase of its capital stock; both authorizations being subject to certain conditions stated in the report. In the same proceeding, the application of the New York Central Railroad Company for authority to purchase the capital stock or physical properties of the Chicago Junction Railway Company was

[fol. 48] denied without prejudice to future proceedings. These companies will be referred to hereinafter as the River Road, the Junction, and the Central.

The railway properties of the River Road and the Junction together form very important terminal facilities in the Chicago switching district, and acquisition of control of these properties by the Central was strongly opposed by other railway companies reaching Chicago and desiring the service of these facilities, and by various shipping interests, the ground of opposition being, in substance, that acquisition by a single trunk line serving the Chicago district would endanger the impartial service of the terminal. To avoid such a result, and otherwise to protect the public interest, the authorizations were made subject to 17 conditions, which were set forth in our report. Among these conditions was one numbered 14, reading as follows:

> Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

The amount of rental reserved under the lease, as executed pursuant to our order, was $2,000,000 per year, which was arrived at by computing 6 per cent upon an assumed value of $33,333,333.

Condition No. 17, of the original report, provided that any party or person having an interest in the subject matter of the report might at any subsequent time make application for such modification of the conditions, or any of them, as might be required in the public interest, and jurisdiction was retained to reopen the proceeding for such purpose. Referring to this provision, as well as to the provisions of the act, the Central, the Junction, and the River Road petitioned that the former report and order be modified by striking therefrom condition No. 14, above quoted, [fol. 49] and that we make a finding that the annual rental reserved under the terms of the indenture of lease of May 19, 1922, made pursuant to the report and order, to be paid

by the River Road to the Junction, is just and reasonable. Petitioners allege that such action is necessary in order to remove an ambiguity, in that a failure to find the rental just and reasonable was inconsistent with the apparent intent of the order, which was to authorize the execution of the lease upon consideration of the rental proposed, subject to conditions applicable thereto. Hearing was set upon this petition for the sole purpose, as stated in the order, of receiving evidence "as to whether the report and order issued herein on May 16, 1922, should be amended by striking therefrom condition No. 14, and by inserting a finding that the annual rental reserved under the terms of the indenture of lease of May 19, 1922, made pursuant to the report and order, to be paid by the Chicago River & Indiana Railroad Company to the Chicago Junction Railway Company, is just and reasonable." Hearing was held on December 19, 1927, at which the petitioners submitted evidence of the value of the properties in question and their earnings since the effective date of the lease, and referred to portions of the record in the original hearing bearing upon the value of the same properties.

At the time of the original hearing we had not completed our valuation of the properties under section 19a of the act, but evidence was then submitted tending to show a cost of reproduction of the Junction properties at the time of the hearing, including the value of its leases, of considerably more than $33,000,000. At the hearing on December 19, 1927, there was placed in evidence our report of the tentative valuation of the property of the Junction as of June 30, 1919, showing a total value of property used by that company on that date of $31,667,626. Petitioners insist that the report does not give sufficient recognition to intangible values and that for this and other reasons the total value at the time of the further hearing was considerably in excess of $33,000,000. Of the total value thus found, about $23,800,000 was made up of land values. In further evidence of the propriety of the amount of rental reserved, [fol. 50] there has been placed in the record a statement of the earnings of the Junction properties since the effective date of the lease showing that after the payment of rental at the rate of $2,000,000 per year the net income of the River Road attributable to the operations of the Junction for the period May 19 to December 31, 1922, was $854,482; for the year 1923, $847,161; for the year 1924, $479,466; for the

year 1925, $164,737; for the year 1926, $551,768; and for the 10 months ending October 31, 1927, $395,381.

While the record upon the original hearing was somewhat indefinite on the question of value of the leased property, it was sufficient to support a finding that the rental consideration was just and reasonable to the extent necessary for a favorable decision upon the application, and the report and order should not be otherwise construed. The propriety of such a finding is supported by the additional facts now in evidence. The original report will be sufficiently amended by striking therefrom the concluding portion of condition No. 14, reading "nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable." This amendment will be made.

At the further hearing a copy of the lease executed May 19, 1922, three days after the issuance of our original report, was placed in the record. Although it refers to our authorization and purports to be based thereon, it nevertheless contains a provision giving the Central, its successors and assigns, the option to purchase, subject to our approval, at a stated price, all of the leased properties at any time during the term of the lease or any extension thereof.[1]

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[1] Article XII of the lease reads as follows:

"*Grant to the Central Company of an Option to Purchase Demised Premises:* The Junction Company and the Yard Company hereby severally covenant and agree that subject to the approval pursuant to law of the Interstate Commerce Commission or of such other public authority, State or Federal, as may have jurisdiction in the premises, the Central Company, its successors and assigns, shall, at its or their option, to be exercised at any time during the term of this lease or of any extension thereof, have the right to purchase and acquire all of the right, title and interest of the Junction Company and the Yard Company in the properties and appurtenances, real and personal by this indenture demised and leased or assigned, or transferred (including all the premises and properties leased by the Yard Company to the Junction Company under the said lease dated December 1, 1913, and leases supplemental thereto mentioned in item (2) of Section 1 of Article 1 hereof, but not

[fol. 51] Harris Brothers Company, of Chicago, intervened at the further hearing for the purpose of securing an appropriate condition or other provision to prevent any implication that the granting of the relief prayed for by the petitioners may be construed as approving or sanctioning the option which was denied without prejudice in our original report. The Pullman Couch Company also intervened at the oral argument, in effect joining in the request of Harris Brothers Company. The carriers take the position that the option, as contained in the existing lease, is innocuous for the reason that it could not be exercised without coming to us for further authority. They nevertheless plead for the retention of the provision in order that it may be available for possible future action. They distinguish between the granting of an option and its exercise, and point out that the original report and order simply denied without prejudice the application "for authority to purchase the capital stock or the physical property" of [fol. 52] the Junction. Such construction is not warranted. The order of May 16, 1922, must be construed as applying to the request for approval of the option sought in that proceeding. The lease should therefore be reformed to the extent necessary to bring it into conformity with our authorization.

An appropriate amendatory order will be issued.

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including the interests of the Yard Company in any properties held by the Junction Company under other leases from the Yard Company) intending hereby to grant to the Central Company, its successors and assigns, an option to purchase and acquire for the price and upon the terms and conditions hereinafter specified all the right, title and reversionary interest of the Junction Company in all of the premises, properties and other interests hereby demised and all the right, title and reversionary interest of the Yard Company in and to the premises and property demised by said lease of December 1, 1913, and/or any and all supplements thereto. The price therefor shall be the sum of thirty-three million, three hundred and thirty-three thousand, three hundred and thirty-three dollars ($33,333,333) payable in cash or in such securities as the Junction Company, the Yard Company and the Central Company shall agree upon. The Central Company shall give to each the Junction Company and the Yard Company sixty (60) days'

AITCHISON, Commissioner, concurring:

In the original report herein, 71 I. C. C. 631, 644, I am noted as dissenting as to the arrangement proposed being in the public interest. That is the initial question to be determined in passing upon applications of this character. It is not before us now, and is foreclosed by the original decision, and the recent refusal of the commission to reopen the proceeding for a consideration of that question. Assuming that question to be determined in favor of the application, the remaining question is as to whether the [fol. 53] terms and conditions of the proposed lease are reasonable and just. Upon that assumption, I can concur in the determination that the lease modified as indicated in the original report and the foregoing report on further hearing, meets the requirements of the statute.

EASTMAN, Commissioner, dissenting:

Without going into the details, which are complicated, the sum and substance of this matter is that for the possession and use of the properties of the Chicago Junction a rental is being paid which, after providing for the rentals which the Chicago Junction itself pays on a large part of the properties, nets that company a huge yearly profit. In justification of this rental reliance is placed upon earn-

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notice in writing of its intention to exercise the option herein provided for, and the Junction Company and the Yard Company hereby severally covenant and agree that upon receipt of said notice and the approval of the public authorities whose approval is required by law each will, at the termination of said sixty (60) days and upon receipt by it of its portion of said purchase price, as hereinafter stipulated, execute and deliver to the Central Company or to its nominee such deeds and other instruments as will effectively convey to the Central Company or to its nominee all their respective right, title and interest in and to the premises, properties and interests above described to be so purchased, such deeds or other instruments to contain full covenants of general warranty with respect to any properties now owned by said companies respectively in fee simple, and covenants of special warranty as to all other properties. The Junction Company and the Yard Company further severally covenant that the properties to be so conveyed shall be free

ings, especially those since the lease became effective, and upon our tentative valuation of the properties, which in part are owned by the Chicago Junction but for the most part are leased by it, largely in perpetuity, at rentals which in comparison with the rental here approved are very low. The evidence as to earnings is of little consequence, for they have been almost wholly derived from trackage or switching charges which have been paid or absorbed by the trunkline connections. It follows that they have not been a matter of concern to shippers, and the competition of the trunk lines for the traffic prevents complaint upon their part. Hence the reasonableness of these charges has not been put to the test. So far as the New York Central is concerned, being the ultimate lessee of the properties, it is also the ultimate beneficiary if earnings are excessive.

The valuation evidence is of more consequence, but analysis shows that the reason why the tentative valuation is high enough to be used in justification of the amount of the rental is because it is based largely on estimates of land values which have increased very greatly since the land was originally purchased or leased. This raises a question of vital public importance. The provision of public highways for rail transportation is a function of the

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and clear of all liens, encumbrances and other liabilities except such as are specified in Exhibit "C" hereto attached, or shall hereafter be created or placed upon the same by the River Company or the Central Company, or with the consent in writing of either of these last named parties (the Central Company to take the same subject thereto and to this lease), and if at the time of the conveyance of said properties any liens, encumbrances or other obligations shall exist upon the same except as specified above, or if for any cause either the Junction Company or the Yard Company shall be unable to convey any as aforesaid portion of said properties or of improvements thereon subject to the option of purchase in this Article XII provided for, (where such inability is not caused by limitation in an instrument or agreement mentioned in said Exhibit C), the amount of any such lien, encumbrance or other obligation or the value of any property or improvement which cannot be so conveyed shall be deducted from the purchase price therein provided for.

State, according to numerous decisions of the Supreme Court. If this public work is to be performed by private companies, they should be fairly compensated. It is right [fol. 54] that they should be protected in every way in an opportunity to earn upon the capital which they devote to the enterprise a return which will amply encourage the further investment of funds which the work in general continually requires. This is a just and economically sound policy which ought to be scrupulously followed. But it is not right nor just nor economically sound that these private companies should be given, in addition, an opportunity to earn a return upon a further amount which does not represent funds which they have invested but which represents increment in the estimated value of property, particularly lands, which they own or use.

The result of the latter policy is that the community gains no benefit whatever from the timely devotion of property to public highway use, but must always pay as if the property were being acquired anew each year in the most un-

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"The Central Company shall by covenants in such instruments of conveyance contained assume or agree to perform all obligations imposed on either the Yard Company or the Junction Company in respect of the properties so to be conveyed thereby by any of the instruments or items enumerated in said Exhibit 'C' or hereafter incurred pursuant to the provisions of this agreement by either of said corporations in connection with the upkeep or operation of said properties or imposed upon either of said corporations by any ordinance, regulation or requirement, present or future, affecting or relating to said properties, of the City of Chicago, or other public body, or by any law of the United States or of the State of Illinois.

"The Central Company shall pay of said purchase price twenty-two million, nine hundred and eighty-seven thousand, five hundred and sixteen dollars ($22,987,516) to the Junction Company and ten million, three hundred and forty-five thousand, eight hundred and seventeen dollars ($10,345,817) to the Yard Company.

"The Junction Company and the Yard Company hereby further covenant and agree that each will take such corporate action as may be necessary and appropriate to make effective the conveyances and transfers in this Article provided for."

timely and improvident fashion. If the State had itself acquired the property originally, a return upon such an increment in values would not only never be sought but in due time the original debt would be retired and cease to be a burden. Such gradual retirement of debt is sound and conservative public finance, but under the prevailing policy when a private railroad company undertakes the same work the corresponding burden upon the public never grows less but on the contrary continually increases and with menacing rapidity where terminal lands in great cities are involved. The notion that a policy which produces such results is right, just, and economically sound is not the product of clear thinking but rests upon assumed property rights which in truth have no solid foundation. Such a policy will never be corrected unless it is analyzed and dissected and its inevitable consequences made plain. In my judgment that is proper and very appropriate work for a public body like this commission. An excellent way to begin this work would be to find that the terms and conditions of the lease here involved are unjust, unreasonable, and contrary to the public interest.

I am authorized to say that Commissioner McManamy joins in this dissent.

Chairman Campbell dissents.

[fol. 55] ORDER

Entered December 3, 1928

Further hearing and investigation of the matters and things involved in this proceeding having been had, and this commission having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That condition numbered 14, as contained in the original report in this proceeding, 71 I. C. C. 631, 641, be, and it is hereby amended by striking therefrom the words "nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable."

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 56] EXHIBIT "C" TO COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity

No. 3427

THE BALTIMORE & OHIO RAILROAD COMPANY, et al.

vs.

UNITED STATES OF AMERICA, et al.

The plaintiffs in this cause having heretofore, upon due notice to all parties, moved for an order dismissing their bill, and the court having considered the motion,

IT IS NOW ORDERED that said bill be and it is hereby dismissed without prejudice to the rights of the defendants, the Chicago Junction Railways and Union Stock Yards Company and the Chicago Junction Railway Company, under their answers and counterclaims filed herein.

And the application of the Pullman Couch Company, for leave to intervene and be made party plaintiff herein, having been withdrawn, and it having been shown to the court that on December 3, 1928, the Interstate Commerce Commission, upon a further hearing, entered a supplemental decision and order with reference to the subject matter involved in this suit; and the transcript of the evidence before the Commission upon the several hearings before it, together with the supplemental decision and order of the Commission, having been submitted to the court herein, [fol. 57-58] and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties.

Enter: George T. Page, Circuit Judge, Carpenter, Judge, Wilkerson, Dist. Judge.

ok. Horace Kent Tenney.
ok. Sidney C. Murray.
ok. R. W. Richards.

[fol. 59] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

COMPLAINT OF INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed February 21, 1946

The Interstate Commerce Commission for its Complaint of Intervention states:

1. The defendants in this cause are common carriers by railroad engaged in interstate commerce and are subject to the provisions of the Act to Regulate Commerce as amended, 49 U. S. Code 1, et seq.

2. On May 16, 1922, in a proceeding entitled "Finance Docket No. 1165, Application of the New York Central Railroad Company for Approval of Purchase of Stock, Lease of Property, and Option to Purchase Stock of Property," the Interstate Commerce Commission made and entered an order authorizing and approving the acquisition by the New York Central Railroad Company, hereinafter termed the "Central," of control of the Chicago River and Indiana Railroad Company, hereinafter termed the "River Road," by purchase of its capital stock, and the acquisition by the River Road of the control, by lease, of the Chicago Junction Railway Company, hereinafter termed the "Junction."

[fol. 60] 3. Said approval and authorization was made and given subject to the observance of certain specified conditions referred to in said order and enumerated and set forth in the report of the Commission in the proceeding. Said report and order are contained in Exhibit A to the plaintiffs' complaint filed in this cause.

4. Condition 3 of the conditions referred to in paragraph 3 hereof is as follows:

> "'The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central.'"

5. By authority of said order the Central acquired control of the River Road by purchase of its capital stock and the River Road acquired control by lease of the Junction.

6. Long prior to the order of the Commission in Finance Docket No. 1165, under the operating arrangements in effect between plaintiffs respectively and the Junction and the River Road, each line-haul carrier, including plaintiffs herein, moved empty livestock cars (other than livestock cars used for the loading of hogs and sheep) to places of loading in the Union Stock Yards on the rails of the Junction with their own power and crews and, after they had been loaded by shippers, moved said cars from said places of loading with their own power and crews over the rails of the Junction, via its connections with their respective lines, to and over said lines as consigned and routed by the shippers. For such privilege a charge of $1.00 per car, loaded and empty, was exacted from plaintiffs. Such operating arrangements continued after the Commission's order and until February 1, 1946.

7. Beginning February 1, 1946, a change was made in the operating arrangements in respect of movements of stock [fol. 61] cars as set forth in paragraph 6 hereof. Instead of allowing each line-haul carrier, including plaintiffs herein, to move empty and loaded stock cars with their own power and crews to and from the places of loading in said Union Stock Yards, the defendants, the Junction and the River Road, lessee, by their power and crews perform all the switching incident to the outbound movement of livestock, and the crews of the line-haul carriers pick up such cars at points of interchange. For such switching service a charge of $12.96 per outbound loaded car is exacted from plaintiffs.

8. The said change in operations as set forth in paragraph 7, constituted and was discontinuance in part of "the present traffic and operating relationships existing between the Junction and River Road" and the plaintiffs herein, and was and is in violation of the order of the Interstate Commerce Commission of May 16, 1922, issued in said Finance Docket No. 1165.

9. The Commission states on information and belief, that certain trackage rights may have been acquired by plaintiffs or some of them, either over the line of railroad of the River Road or over the line of the Junction or over both, by reason of written agreements, or otherwise. That the change in the operation agreements has brought about

abandonment wholly or in part of such trackage use and operation. That such abandonment is unlawful unless authorized by the Commission. No such authorization has been sought or given.

10. The Commission is by statute (Sec. 5(8) of the Interstate Commerce Act, 49 U. S. Code 5(8)) authorized to seek, and the District Courts of the United States are given jurisdiction to afford, injunctive or mandatory relief to restrain violation of or compel obedience to an order issued under Section 5.

[fol. 62] Wherefore, this Intervener prays:

1. That a preliminary injunction issue restraining and enjoining the defendants and each of them, their respective officers, agents, representatives, servants, employees and successors from

(a) failing and neglecting to obey said order of the Commission of May 16, 1922;

(b) violating condition 3 of said order of the Commission of May 16, 1922;

(c) interfering with, abrogating, or failing or refusing to accord, such trackage rights over the line of the Chicago River and Indiana Railroad and of the Chicago Junction Railway or either of them, which the plaintiffs or any of them may be found to be entitled to.

2. That upon final hearing said injunction may be made permanent.

3. That the Court grant such other and further relief as may appear just and equitable in the premises.

Interstate Commerce Commission, by H. L. Underwood, Its Attorney, 3341 Interstate Commerce Commission, Washington, D. C.

[fols. 63-64] *Duly sworn to by H. L. Underwood. Jurat omitted in printing.*

[fol. 65] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION OF FACTS—Filed February 25, 1946

It is hereby stipulated by and between The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, plaintiffs; Interstate Commerce Commission, intervening plaintiff; and The Chicago River and Indiana Railroad Company, Chicago Junction Railway Company, and The New York Central Railroad Company, defendants, by their respective attorneys, that the following stipulation of facts shall be considered as evidence in this cause on the hearing of the motions for preliminary injunction of plaintiffs and intervening plaintiff, and that the facts herein stated shall be taken as true and shall be binding upon the parties hereto, except that objections may be made on brief as to relevancy and materiality and shall have the same force and effect as if made when the evidence was offered;

[fol. 66] 1. Plaintiffs are corporations organized and existing by virtue of the laws of the following states respectively: The Baltimore and Ohio Railroad Company, Maryland; The Chesapeake and Ohio Railway Company, Virginia; Erie Railroad Company, New York; Grand Trunk Western Railroad Company, Michigan and Indiana; The New York, Chicago and St. Louis Railroad Company, New York, Pennsylvania, Ohio, Indiana and Illinois; The Pennsylvania Railroad Company, Pennsylvania; Pere Marquette Railway Company, Michigan; Wabash Railroad Company, Ohio.

2. Plaintiffs respectively operate certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and are common carriers engaged in the transportation of property (including livestock) by railroad between Chicago, Illinois, and points in other states of the United States.

3. Intervening plaintiff is a public body organized and existing under Sections 11 and 24 of Part I of the Interstate Commerce Act (Tit. 49, U. S. Code, Secs. 11 and 18) and was duly permitted to intervene in this case as a party plaintiff by order of this Court entered February 21, 1946.

4. Defendant, The Chicago River and Indiana Railroad Company (herein called the River Road), is a corporation organized and existing by virtue of the laws of the State of Illinois, and operates a line of railroad serving the Union Stock Yards, Chicago, Illinois, and connecting at Chicago, Illinois, with plaintiffs' respective lines of railroad and with the line of railroad of The New York Central Railroad Company, one of the defendants herein, referred to in paragraph 6 hereof, and is a common carrier engaged in the transportation of property (including livestock) by railroad (in connection with various connecting common carriers by railroad, including plaintiffs and defendant, The New York Central Railroad Company, as their various [fol. 67] routes may run) between said Union Stock Yards, Chicago, Illinois, and points in other states of the United States.

5. Defendant, Chicago Junction Railway Company (herein called the Junction), is a corporation organized and existing by virtue of the laws of the State of Illinois, and owns certain lines of railroad and leases certain other lines of railroad serving said Union Stock Yards, which lines (owned and leased) are leased to and operated by the River Road under lease dated May 19, 1922, hereinafter mentioned.

6. Defendant, The New York Central Railroad Company (herein called the Central), is a corporation organized and existing by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and operates certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and is a common carrier engaged in the transportation of property (including livestock) by railroad between such points.

7. On May 16, 1922, and for many years prior thereto, plaintiffs or their predecessors in interest moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own

power and crews from their respective lines, via their respective connections with the line now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of loading with their own power and crews over said line, via the connections of said line with their respective lines, and thence to destination as consigned and routed by the shippers. On and immediately prior to May 16, 1922, a charge of $1.00 per car, loaded and empty, was paid by plaintiffs respectively or their predecessors in interest for the privilege of so moving said cars.

8. On December 28, 1920, the Central filed with the Interstate Commerce Commission (herein called the Commis- [fol. 68] sion) its application for approval, *inter alia*, of the following proposed transactions:

> "(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;
>
> "(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity;"

the proceeding on which application was known and described on the docket of the Commission as *Chicago Junction Case*, Finance Docket No. 1165. On May 16, 1922, the Commission made and entered a report and order in said proceeding, which are reported in 71 I. C. C. at pages 631-650, a copy of which, marked Exhibit A, is attached to the original complaint herein and by this reference made a part hereof.

By said report and order the Commission approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows (71 I. C. C. p. 650):

> "That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative,

to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive."

The conditions so referred to included the following condition (71 I. C. C. p. 639):

[fol. 69] "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

After having enumerated the foregoing conditions in said report, the Commission made the following finding (71 I.C.C. p. 641):

"Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

Said report and order were duly served on defendants and each of them on May 18, 1922.

9. On May 19, 1922, pursuant to the approval and authorization granted in said order of May 16, 1922, the Central acquired control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000, and the River Road acquired control of the property (owned and leased) of the Junction by lease. Said control of the River Road by the Central and of the property of the Junction by the River Road has continued from that date down to the present time and is still in effect. From May 19, 1922, to and including January 31, 1946, the River Road continued in effect the operating arrangements described in paragraph 7 hereof.

10. On December 3, 1928, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case*, which report and order are reported in 150 I.C.C. at pages 32-38, a copy of which, marked Exhibit B, is attached to the original complaint herein and by this reference made a part hereof. Said report on fur-

ther hearing and order of the Commission amended condition 14 of its report and order of May 16, 1922. Said report on further hearing and order were duly served on [fol. 70] defendants and each of them on the 14th day of December, 1928. As so amended said report and order of May 16, 1922, are still in full force and effect.

11. On January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain proceeding then pending in said Court entitled *The Baltimore & Ohio Railroad Company et al.* v. *United States of America et al.*, in equity No. 3427, to which proceeding all of the plaintiffs herein or their respective predecessors in interest and all of the defendants herein were parties, entered a final decree, copy of which, marked Exhibit C, is attached to the original complaint herein and by this reference made a part hereof. By said decree said Court found and decreed with respect to the Commission's said order of May 16, 1922, as follows:

> "and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties."

12. On or about January 25, 1946, J. L. McKee, vice-president of the Central and of the River Road, announced that on and after February 1, 1946, line haul carriers (including plaintiffs and the Central) would not be permitted to continue to move stock cars as set forth in paragraph 7 hereof, and that, when such cars were to be placed for loading on the line of the River Road in said Union Stock Yards, they would be moved by the power and crews of the River Road from points of interchange with such carriers respectively on the line of the River Road to such places of loading, and after they had been loaded at such places of loading, would be moved thence by the power and crews of the River Road to points of interchange with such carriers respectively on the line of the River Road, and that at such points they would be delivered by the River [fol. 71] Road to such carriers respectively, and that, upon the taking effect on February 1, 1946, of the aforesaid change, instead of the charge of $1.00 per car, loaded and empty, theretofore paid by such carriers respectively to

the River Road and accepted by it in full payment for the privilege of moving such cars as described in paragraph 7 hereof, there would be due and owing from such carriers respectively to the River Road, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945, $12.96 per outbound loaded car as a division of the joint through rate on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via the respective lines of such carriers.

13. After the announcement made, as stated in paragraph 12 hereof, on or about January 25, 1946, plaintiffs and each of them made written protest to the Central and the River Road objecting to the change referred to in paragraph 12 hereof, and demanding that the traffic and operating relationships theretofore in effect be continued.

14. Pursuant to the announcement referred to in paragraph 12 hereof, on and at all times since February 1, 1946, the River Road has caused its employees to fail and refuse and the employees of the River Road have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at loading places on the line of the River Road in said Union Stock Yards and to move said cars from said loading places, and have required plaintiffs' respective crews to place empty stock cars in an interchange yard on the line of the River Road which yard is used by plaintiffs respectively and the River Road for the interchange of cars, and have required plaintiffs respectively to receive such cars, after the same had been loaded at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in [fol. 72] said Union Stock Yards and, after having been there loaded, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. At all times on and since February 1, 1946, the River Road has failed and refused and still continues to fail and refuse to permit plaintiffs to move stock cars as set forth in paragraph 7 hereof.

15. The Brotherhood of Railroad Trainmen, bargaining agent under the Railway Labor Act for River Road trainmen, having failed to settle certain disputes—among others

a demand, claimed by said Brotherhood to be based upon a contract with the River Road, that River Road trainmen be given the work of moving and switching stock cars described in paragraph 12 hereof—notified the River Road, under authority of an almost unanimous strike vote of said trainmen, that unless said disputes were settled before 10:30 P. M., January 23, 1946, River Road trainmen would go out on a strike at that hour. Under continued threat of such a strike the River Road shortly before the hour set for said strike made an agreement with said Brotherhood which, among other things, provided that said work of moving and switching cars be given to River Road trainmen. J. L. McKee, Vice President of the River Road and of the Central, participated in the negotiations with the Brotherhood of Railroad Trainmen and signed the foregoing agreement as Vice President of said railroads.

16. Prior to May 19, 1922, the Junction operated a small but important switching road in and around the Union Stock Yards, at Chicago, in conjunction with a connecting switching line owned and operated by the River Road.

17. By the aforesaid lease dated May 19, 1922, the Junction demised and leased all of its lines of railroad and other railroad properties (including its locomotives and cars) to the River Road at a rental of $2,000,000 per annum for a term of ninety-nine years, and thereafter at the election of the River Road in perpetuity.

[fol. 73] 18. Said lease, so authorized by the Interstate Commerce Commission, provided:

> "The River Company (i.e. River Road) shall have the right to conduct, operate and manage, and will so do at its own sole cost and expense, the premises and properties by this instrument demised, and it will, during the term hereof, at its own sole cost and expense maintain, renew, replace and repair all of the same."

19. Upon the execution of said lease of May 19, 1922, the Junction surrendered possession of said lines of railroad and other railroad properties to the River Road. Thereupon the River Road took over the personnel of the Junction, except a few of its officers, and since that time the said properties so leased have been operated solely by the River Road under the name and caption of "Chicago Junction

Railway, Chicago River and Indiana Railroad Company, Lessee".

20. The Junction does not now have, and at no time since May 19, 1922, has had, any tariffs on file with the Interstate Commerce Commission. At no time since said date has it operated or in any way participated in the operation of the properties leased by it to the River Road, nor has it had any voice in the management or operation of the River Road or said properties so leased. At no time since said date has it had any operating or traffic department, officers or employees; nor has it been in the possession of said properties. Any changes in operating practices placed in effect on said properties on February 1, 1946, or at any time since May 19, 1922, were not suggested, made, authorized, participated in or concurred in by the Junction.

21. The Junction is, and at all times since May 19, 1922, has been, a non-operating, lessor railroad corporation. It has only three officers or employes, namely, a President, a Secretary and Treasurer, and an Auditor.

[fols. 74-75] 22. At no time since May 19, 1922, has the Junction had any traffic or operating relationships, arrangements or agreements with plaintiffs, the River Road or the Central, or with any other common carrier by railroad serving the City of Chicago. At all times since May 19, 1922 the sole activities of the Junction have been those of a non-operating, lessor railroad corporation, consisting principally of the collection and distribution of the rentals received under the aforesaid lease of May 19, 1922 to the River Road.

Dated at Chicago, Illinois, February 25, 1946.

E. S. Ballard, Wm. F. Price, Pope & Ballard, Attorneys for Plaintiffs, 120 South LaSalle Street, Chicago 3, Illinois. H. L. Underwood, Attorney for Interstate Commerce Commission, Intervening Plaintiff, 3341 I. C. C. Building, Washington, D. C. Sidney C. Murray, Marvin A. Jersild, Attorneys for Defendants The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, 536 LaSalle Street Station, Chicago 5, Illinois. Winston Strawn & Shaw, Guy A. Gladson, Bryce L. Hamilton, Attorneys for Defendant, Chicago Junction Railway Company, 1400 First National Bank Building, Chicago 3, Illinois.

[fol. 76] In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil No. 46 C 275

The Baltimore and Ohio Railroad Company, et al., Plaintiffs,

vs.

The Chicago River and Indiana Railroad Company, et al., Defendants

Interstate Commerce Commission, Intervening Plaintiff

Order Granting Temporary Injunction—March 14, 1946

This cause coming on to be heard on the motions of plaintiffs and intervening plaintiff for a preliminary injunction; and due notice having been given to defendants; and the Court having considered the stipulation of facts entered into by all of the parties hereto and having considered the arguments of counsel and being fully advised in the premises, makes the following

Findings of Fact

1. That plaintiffs are corporations organized and existing by virtue of the laws of the following states respectively: The Baltimore and Ohio Railroad Company, Maryland; [fol. 77] The Chesapeake and Ohio Railway Company, Virginia; Erie Railroad Company, New York; Grand Trunk Western Railroad Company, Michigan and Indiana; The New York, Chicago and St. Louis Railroad Company, New York, Pennsylvania, Ohio, Indiana and Illinois; The Pennsylvania Railroad Company, Pennsylvania; Pere Marquette Railway Company, Michigan; Wabash Railroad Company, Ohio; and respectively operate certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and are common carriers engaged in the transportation of property (including livestock) by railroad between Chicago, Illinois, and points in other states of the United States;

2. That defendant, The Chicago River and Indiana Railroad Company (herein called the River Road), is a corporation organized and existing by virtue of the laws of

the State of Illinois, and operates a line of railroad serving the Union Stock Yards, Chicago, Illinois, and connecting at Chicago, Illinois, with plaintiffs' respective lines of railroad and with the line of railroad of The New York Central Railroad Company, one of the defendants herein, and is a common carrier engaged in the transportation of property (including livestock) by railroad (in connection with various connecting common carriers by railroad, including plaintiffs and defendant, The New York Central Railroad Company, as their various routes may run) between said Union Stock Yards, Chicago, Illinois, and points in other states of the United States;

3. That defendant, Chicago Junction Railway Company (herein called the Junction), is a corporation organized and existing by virtue of the laws of the State of Illinois, and owns certain lines of railroad and leases certain other lines of railroad serving said Union Stock Yards, which lines (owned and leased) are leased to and operated by the River Road;

[fol. 78] 4. That defendant, The New York Central Railroad Company (herein called the Central), is a corporation organized and existing by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and operates certain lines of railroad extending from Chicago, Illinois, to points in other states of the United States and is a common carrier engaged in the transportation of property (including livestock) by railroad between such points;

5. That on May 16, 1922, and for many years prior thereto, plaintiffs or their predecessors in interest moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own power and crews from their respective lines, via their respective connections with the line now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of loading with their own power and crews over said line, via the connections of said line with their respective lines, and thence to destination as consigned and routed by the shippers. On and immediately prior to May 16, 1922, a charge of $1.00 per car, loaded and empty, was paid by plaintiffs

respectively or their predecessors in interest for the privilege of so moving said cars;

6. That on December 28, 1920, the Central filed with the Interstate Commerce Commission (herein called the Commission) its application for approval, *inter alia*, of the purchase by the Central of all of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction for a term of 99 years and thereafter, at the option of the lessee, in perpetuity, the proceeding on which application was known and described on the docket of the Commission as *Chicago Junction Case*, Finance Docket No. 1165. On May 16, 1922, [fol. 79] the Commission made and entered a report and order in said proceeding, whereby it approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows:

> "That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive."

The "carriers above named", referred to in the foregoing clause of said order were the River Road, the Junction and the Central. The conditions referred to in said clause included the following:

> "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

After having enumerated in its said report the 17 conditions referred to in said clause, the Commission made the following finding:

> "Subject to the observance of the above conditions, we find that the acquisition by the Central of the

capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

Said report and order were duly served on defendants and each of them on May 18, 1922;

7. That on May 19, 1922, pursuant to the approval and [fol. 80] authorization granted in said order of May 16, 1922, the Central acquired control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000, and the River Road acquired control of the property (owned and leased) of the Junction by lease. Said control of the River Road by the Central and of the property of the Junction by the River Road has continued from that date down to the present time and is still in effect;

8. That on December 3, 1928, on the petition of the Central, the Junction and the River Road, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case*, whereby it amended condition 14 of its report and order of May 16, 1922, which condition is irrelevant to the issues in this proceeding. Said report on further hearing and order were duly served on defendants and each of them on the 14th day of December, 1928. As so amended said report and order of May 16, 1922, are still in full force and effect;

9. That on January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a certain proceeding then pending before it entitled *The Baltimore & Ohio Railroad Company et al.* v. *United States of America et al.*, In Equity No. 3427, to which all of the plaintiffs herein or their respective predecessors in interest and all of the defendants herein were parties and in which one of the issues was the validity of the Commission's said order of May 16, 1922, entered a final decree, whereby it found and decreed with respect to said order as follows:

> "and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of Decem-

[fol. 81] ber 3, 1928, is valid and binding upon all of the parties.";

10. That on or about January 25, 1946, the Central and the River Road notified plaintiffs that on and after February 1, 1946, the Central and the River Road would not permit plaintiffs to continue to move stock cars as plaintiffs had theretofore moved the same as aforesaid and that, when such cars were destined to places of loading on the line of the River Road in said Union Stock Yards, plaintiffs would be required to deliver the same to the River Road at points of interchange with plaintiffs respectively on its line and such cars would then be moved by the power and crews of the River Road from such points of interchange to such places of loading and, after they had been loaded at such places of loading, would be moved thence by the power and crews of the River Road to points of interchange with plaintiffs respectively on the line of the River Road, and that at such points they would be delivered by the River Road to plaintiffs respectively, and that, instead of the charge of $1.00 per car, empty and loaded, theretofore paid by plaintiffs respectively to the River Road and accepted by it in full payment for the right to move such cars as theretofore, the River Road would demand and exact from plaintiffs respectively $12.96 per outbound loaded car as a division of the joint through rates on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via plaintiffs' respective lines, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945;

11. That after having been notified as aforesaid, plaintiffs and each of them made written protest to the Central and the River Road objecting to the aforesaid change and demanding that the traffic and operating arrangements theretofore in effect be continued;

[fol. 82] 12. That pursuant to said notification, on and at all times since February 1, 1946, the River Road has caused its employees to fail and refuse and said employees have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at places of loading on the line of the River Road in said Union Stock Yards and to move said cars

from said places of loading, and have required plaintiffs' respective crews to place stock cars in an interchange yard on the line of the River Road and have required plaintiffs respectively to receive such cars, after the same have been loaded at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in said Union Stock Yards and, after having been there loaded, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. At all times on and since February 1, 1946, the River Road has failed and refused and still continues to fail and refuse to permit plaintiffs to move stock cars as they had theretofore moved the same as aforesaid;

13. That the aforesaid change in operating arrangements which took place on February 1, 1946, constituted a discontinuance of traffic and operating relationships existing on and prior to May 16, 1922, between the Junction and the River Road on the one hand and plaintiffs on the other hand;

14. That on and after February 1, 1946, the Central failed to prevent the River Road from causing its employees to fail and refuse to throw the switches necessary to permit the power and crews of plaintiffs respectively to move stock cars to and from points of loading in said Union Stock Yards on the line of the River Road as they had theretofore moved such cars as aforesaid;

[fol. 83] 15. That on and after February 1, 1946, the Junction failed to prevent the River Road from causing its employees to fail and refuse to throw the switches necessary to permit the power and crews of plaintiffs respectively to move stock cars to and from points of loading in said Union Stock Yards on the line of the River Road as they had theretofore moved such cars as aforesaid;

16. That plaintiffs and each of them have been injured by being deprived of the trackage rights formerly enjoyed by them over the lines of the River Road to and from the loading platforms in the Union Stock Yards, by being deprived of direct access to shippers of livestock from said Union Stock Yards and of the opportunity to serve such shippers with plaintiffs' own power and crews respectively,

and by being made liable to the River Road for $12.96 per outbound loaded car of livestock other than hogs and sheep as a division of the joint through carload rate thereon instead of $2.00 per outbound loaded car as a trackage charge.

On the basis of the foregoing, the Court makes the following

Conclusions of Law

1. That the Court has jurisdiction of the parties to and the subject matter of this cause;

2. That plaintiffs and defendants are subject to Part I of the Interstate Commerce Act, Title 49, U. S. Code, Sections 1-27;

3. That this suit arises under paragraph 12 of Section 16 of Part I of the Interstate Commerce Act;

4. That the aforesaid operating arrangements which were in effect as between plaintiffs or their predecessors in interest respectively on the one hand and the River Road [fol. 84] and the Junction on the other hand on and prior to May 16, 1922, were traffic and operating relationships then existing between said carriers within the meaning of condition 3 of the report and order of the Interstate Commerce Commission of May 16, 1922, in Finance Docket No. 1165;

5. That by virtue of the aforesaid acquisition by the Central of control of the River Road through the purchase of its capital stock and acquisition of control by the River Road of the property (owned and leased) of the Junction by lease, all on May 19, 1922, pursuant to the approval and authorization granted by the Interstate Commerce Commission in its said order of May 16, 1922, the Central, the Junction and the River Road became obligated to abide by the conditions enumerated in said report and order of May 16, 1922, and, by operation of law, an agreement came into effect between the Central, the Junction and the River Road on the one hand and plaintiffs and other common carriers by railroad similarly situated on the other hand to abide by said conditions;

6. That from May 19, 1922, to the present time the Central has had and now has control of the traffic and operating relationships existing between the Junction and the

River Road on the one hand and plaintiffs respectively on the other hand;

7. That said report and order of May 16, 1922, was and is valid and binding on defendants and each of them;

8. The the aforesaid change in operating arrangements which took place on February 1, 1946, constituted a discontinuance of traffic and operating relationships existing on and prior to May 16, 1922, between the Junction and the River Road on the one hand and plaintiffs on the other hand, within the meaning of said order of May 16, 1922, and was and is a violation of said order and of condition 3 [fol. 85] of said order and was and is a breach of said agreement to abide by the conditions of said order and was and is a violation of paragraphs 2 and 4 of Section 5 of Part I of the Interstate Commerce Act;

9. That the River Road, the Central and the Junction and each of them were responsible for such discontinuance, were and are parties to such violation and were and are participants in such disobedience;

10. That the facts stated in paragraph 15 of the stipulation of facts are irrelevant and immaterial;

11. That plaintiffs and each of them are, within the meaning of paragraph 12 of Section 16 of Part I of the Interstate Commerce Act, parties injured by the aforesaid discontinuance of traffic and operating relationships existing on and prior to May 16, 1922, between the Junction and the River Road on the one hand and plaintiffs on the other hand, by the aforesaid violation of said order of May 16, 1922, and of condition 3 thereof, and by the aforesaid breach of said agreement to abide by the conditions of said order.

Wherefore, it is ordered, adjudged and decreed That, pending further order of this Court, the Chicago River and Indiana Railroad Company, Chicago Junction Railway Company and The New York Central Railroad Company, their respective officers, agents, representatives, employees and successors, and all other persons in active concert and

participation with them, be and they hereby are restrained and enjoined from

(a) failing and neglecting (with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards) to obey said order of the Commission of May 16, 1922, as amended;

(b) violating (with respect to the transportation of [fol. 86] livestock other than hogs and sheep from said Union Stock Yards) condition 3 of said order of the Commission of May 16, 1922, as amended;

(c) breaching (with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards) their agreement to abide by condition 3 of said order of the Commission of May 16, 1922, as amended;

(d) failing and refusing to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of the River Road to points of loading on said line in said Union Stock Yards and, after such cars have been loaded, so to move the same from said points of loading over the line of the River Road to plaintiffs' respective lines;

and commanded to permit plaintiffs respectively to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the line of The Chicago River and Indiana Railroad Company to points of loading in said Union Stock Yards and, after having been loaded, from said points over the line of The Chicago River and Indiana Railroad Company to plaintiffs' respective lines;

It is further ordered, adjudged and decreed that this order shall be effective from and after 11:59 P. M., March 15, 1946;

It is further ordered, adjudged and decreed that plaintiffs filed their bond, with corporate surety, to be approved by the Court, in the sum of $10,000.00, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

And it further ordered, adjudged and decreed that the motions of the Chicago Junction Railway Company to [fols. 87-88] dismiss the action as to it be, and they hereby are continued until final hearing.

Enter:

(Signed) Elwyn R. Shaw, Judge, U. S. District Court.

March 14, 1946.

[fols. 89-90] In the District Court of the United States

[Title omitted]

Order Denying Motions of Brotherhood of Railroad Trainmen—March 19, 1946

The Court being fully advised in the premises It Is Ordered that the motions of the Brotherhood of Railroad Trainmen by counsel for leave to file its special appearance herein and to vacate the temporary injunction and dismiss these proceedings because of failure to join indispensable parties be and they are hereby denied

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[fol. 91] In the District Court of the United States

[Title omitted]

Motion of Brotherhood of Railroad Trainmen for Leave to File Special Appearance—March 18, 1946

To the Honorable Elwyn R. Shaw, Judge of Said Court:

Now comes Brotherhood of Railroad Trainmen, an unincorporated association, appearing by Adams Nelson & Williamson, its attorneys, specially for the purposes of this motion and not generally, and moves the Court to grant leave to said Brotherhood of Railroad Trainmen to file its appearance herein specially and not generally, for the purpose of bringing to the attention of this Honorable Court the lack of jurisdiction herein due to the fact that certain parties indispensable to this proceeding are not joined, and for the purpose of moving to vacate the temporary injunction herein and to dismiss this proceeding on account of such non-joinder.

Wherefore, the Brotherhood of Railroad Trainmen prays that an order may be entered herein authorizing it to appear specially and not generally for the sole purpose of bringing [fol. 92] to the attention of this Honorable Court the lack of jurisdiction herein due to the fact that certain parties indispensable to this proceeding are not joined, and for the purpose of moving to vacate the temporary injunction herein and to dismiss this proceeding on account of such non-joinder.

Adams Nelson & Williamson, by Burke Williamson, Attorneys for Brother of Railroad Trainmen, appearing only and solely for the purpose of this motion and not generally, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

[fol. 93] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO VACATE TEMPORARY INJUNCTION AND TO DISMISS PROCEEDINGS FOR FAILURE TO JOIN INDISPENSABLE PARTIES—March 18, 1946

To the Honorable Elwyn R. Shaw, Judge of Said Court:

1. Now comes Brotherhood of Railroad Trainmen, an unincorporated association, and pursuant to leave of court first obtained to appear specially and not generally for the purpose of filing this motion, moves the court to vacate the temporary injunction herein and to dismiss this proceeding because of failure to join as parties defendant herein any of the yard work employees of the Chicago River and Indiana Railroad Company and the Chicago Junction Railway Company, Defendants herein, or the Brotherhood of Railroad Trainmen as representative of such employees.

2. Such employees or their representative are indispensable parties herein, as appears more particularly from Affidavit executed by William Bishop, Vice President, [fol. 94] Brotherhood of Railroad Trainmen and Felix E. Kazmer, General Chairman, Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company and Chicago Junction Railway Company, which Affidavit is attached hereto and made a part hereof.

Wherefore, Brotherhood of Railroad Trainmen prays that an order may be entered herein vacating the temporary injunction order issued herein on March 14, 1946 and dismissing the within proceeding.

Dated March 18, 1946.

Adams Nelson & Williamson, by Burke Williamson, Attorneys for Brotherhood of Railroad Trainmen, appearing solely for the purposes of the above motion and not generally, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

[fol. 95] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT

Now come William Bishop and Felix E. Kazmer, and being first duly sworn, depose and say:

1. Said Bishop is now serving and at all times mentioned herein was serving as Vice President of Brotherhood of Railroad Trainmen, an unincorporated association. He resides in the City of Evanston, State of Illinois, and has his office in Chicago, Illinois.

2. Said Kazmer is now serving and at all times mentioned herein was serving as General Chairman of Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company. He is an employee of the Chicago River and Indiana Railroad Company. He resides in the City of Chicago, State of Illinois.

3. The Brotherhood of Railroad Trainmen, an unincorporated association, has some 215,000 members throughout [fol. 96] the United States and Canada and acts as representative of many thousands of employees of carriers under the provisions of the Railway Labor Act (Title 45 U. S. C. A., Chap. 8).

4. The Brotherhood of Railroad Trainmen does now and has for many years last past represented employees in yard service of the Chicago River and Indiana Railroad Com-

pany, lessee of the Chicago Junction Railway Company, in collective bargaining with such lessee railroad. Such employees total some 400 men, substantially all of whom reside in the City of Chicago, State of Illinois. As a result of such collective bargaining said employees entered into an agreement with the Chicago River and Indiana Railroad Company, lessee of the Chicago Junction Railway Company, concerning rates of pay, rules and working conditions of such employees. This agreement, which is now and has been in effect for several years last past, is entitled: "Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement." Article III thereof is, in part, as follows:

"ARTICLE III

Defining Yard Work.

(a) The following shall be considered yard work, shall be handled by yardmen and shall be compensated for at not less than yard rates.

(b) The switching of all freight and passenger equipment operating exclusively within the switching limits;

(c) The transfer of all freight and passenger equipment operating exclusively within the switching limits;"

[fol. 97] Article X of said agreement is as follows:

"ARTICLE X

Seniority Privileges

(a) Seniority rights of yardmen will date from the time they enter the service continuous in yards or terminal where employed.

Yardmen.

(b) The right to preference of work and of promotion will be governed by seniority in service. The yardmen oldest in service will be given the preference, if competent.

(c) In the appointment of Yardmasters and Assistant Yardmasters the senior yardmen will, in all cases, be given full and unprejudiced consideration.

Switchtenders:

(d) Seniority rights of switchtenders will date from the time they entered the service continuous in yards or terminal where employed.

(e) The right to preference of work will be governed by seniority in service. The switchtender oldest in service will be given preference providing the applicant is competent."

Article XXIV of said agreement is, in part, as follows:

"ARTICLE XXIV

Adjustment of Controversies on Schedule.

Any controversy arising as to the application of the rules herein agreed upon to the schedule of the individual roads, between officers, yardmen and switchtenders, shall be taken up by the local committee and the local officials of the individual roads. In the event of failure on their part to agree on a satisfactory basis of settlement the Committee of the Brotherhood of Railroad Trainmen, representing the yardmen and switchtenders, may take up the question with the General Manager.

5. As a result of the aforesaid Chicago Memorandum of Agreement and its provisions with respect to the handling of yard work and seniority in such work, employees in such [fol. 98] service on the Chicago River and Indiana Railroad Company acquired a property right in and to all such work.

6. Some time ago a controversy arose between the employees in yard service of the Chicago River and Indiana Railroad Company and said company as to the interpretation of said Chicago Memorandum of Agreement, with particular reference to the handling of certain yard work by employees of other railroads on the tracks leased by the Chicago River and Indiana Railroad Company. On January 23, 1946 the Brotherhood of Railroad Trainmen, through the Affiant William Bishop, Vice President of Brotherhood of Railroad Trainmen, and Affiant Felix E. Kazmer, General Chairman, Brotherhood of Railroad Trainmen, the Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company, effected a

settlement of this controversy on behalf of the yard employees of the Chicago River and Indiana Railroad Company by written agreement with such company and the Chicago Junction Railway Company. This settlement interpretation was made under the provisions of the aforesaid ARTICLES III, X, and XXIV of said Chicago Memorandum of Agreement. The settlement interpretation is that referred to in paragraph 15 of the STIPULATION OF FACTS heretofore filed by the parties herein. By the terms of this settlement interpretation certain yard work on the tracks of the Chicago River and Indiana Railroad Company was to be handled by its own yard employees. The Complaint in the present proceeding seeks to nullify such [fols. 99-100] settlement interpretation, and to give such yard work on the tracks leased by the Chicago River and Indiana Railroad Company to employees of other railroads.

7. The Brotherhood of Railroad Trainmen, through these affiants, may act in a representative capacity for employees of the Chicago River and Indiana Railroad Company in yard service.

8. In the event the Chicago River and Indiana Railroad Company fails to give yard work to its yard employees in accordance with said Chicago Memorandum of Agreement and the settlement interpretation of January 23, 1946, such failure may result in claims by such employees against said railroad company for money damages and other relief.

9. Any action taken in this proceeding in the absence of yard employees of the Chicago River and Indiana Railroad Company or their representative will have an injurious effect on them for the reason that it may alter adversely the contract rights to which they are entitled under the said Chicago Memorandum of Agreement and said settlement interpretation of January 23, 1946 and may thus prejudice such employees in their right of collective bargaining.

William Bishop. Felix E. Kazmer.

Subscribed and sworn to before me this 16th day of March, 1946. Agnes Stasio, Notary Public. (Seal.)

[fol. 101] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

TRANSCRIPT OF PROCEEDINGS—Filed April 5, 1946

[fol. 102] Transcript of proceedings had in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, in his courtroom, United States Court House, Chicago, Illinois, on Monday, March 18, 1946, 10 o'clock a.m.

Present:

Messrs. Pope & Ballard, by Mr. Ernest S. Ballard and Mr. William F. Price, on behalf of plaintiffs;

[fol. 103] Mr. Sidney C. Murray, on behalf of defendants The Chicago River and Indiana Railroad Company and The New York Central Railroad Company;

Messrs. Winston, Strawn & Shaw, by Mr. Guy A. Gladson, on behalf of defendant Chicago Junction Railway Company;

Mr. Harry L. Underwood, on behalf of Interstate Commerce Commission, Intervening Plaintiff;

Mr. Paul E. Blanchard, on behalf of Armour and Company;

Messrs. Adams, Nelson & Williamson, by Mr. Burke Williamson, on behalf of Brotherhood of Railroad Trainmen.

By the Clerk: The Baltimore and Ohio Railroad Company, et al., vs. The Chicago River and Indiana Railroad Company, et al. Motion for leave to file a special appearance of Brotherhood of Railroad Trainmen; motion of Brotherhood of Railroad Trainmen to vacate temporary injunction and dismiss proceedings for failure to join indispensable parties.

[fol. 104] Mr. Williamson: I appear this morning on behalf of Brotherhood of Railroad Trainmen. I ask leave to file their special appearance, to call your Honor's attention to the failure to join indispensable parties. The indispensable parties not joined here, your Honor, are the 400 employees of the Chicago River and Indiana Railroad Company. I ask leave to file the motion of the Brotherhood of Railroad Trainmen for leave to file their special appearance, for the purpose of calling to your Honor's attention this fatal defect of the parties.

I ask an order be entered granting leave to the Brotherhood of Railroad Trainmen to file that special appearance and to file also the motion of the Brotherhood of Railroad Trainmen to vacate the temporary injunction and to dismiss the proceedings for failure to join indispensable parties.

If your Honor grants me that permission I will enter my appearance this morning specially for that purpose.

The Court: Why should you enter a special appearance?

Mr. Williamson: Your Honor, the proceedings have gone so far now as to have been, for all practical purposes, decided on the merits. I do not wish, your Honor, to submit my client to the jurisdiction of the court so far as being [fol. 105] bound by all the action heretofore taken.

The Court: There has been no action taken except the issuance of the temporary injunction.

Mr. Williamson: Certain portions of the Court's findings of fact and conclusions of law as contained in the preliminary injunction constitute a finding on the merits. We, therefore, do not wish to subject ourselves to the general jurisdiction of the Court and be bound by the action already taken.

The Court: Well, either you are an indispensable party or you are not an indispensable party, one or the other; I don't know which it is. But it is one or the other. If you are an indispensable party, acts that have been taken heretofore without your being joined would not be binding on you.

Mr. Williamson: Yes.

The Court: If you are not an indispensable party, then you haven't any business in here.

Mr. Ballard: That is our position, if your Honor please.

Mr. Williamson: If your Honor please, without going into that, even if we are a necessary party we might be in here——

The Court: If you want to file a general appearance you may do so.

[fol. 106] Mr. Williamson: Your Honor, as to the extent to which we should be bound, as I understand it, your Honor would not wish us bound by any——

The Court: How can anybody be bound by anything when they are not a party to it?

Mr. Williamson: Your Honor, if the preliminary injunction, the findings of fact and conclusions of law stand, then these defendants, if we come in, will not have a hearing on

the merits, because that has already been had; Your Honor has already——

The Court: There has been no hearing on the merit.

Mr. Williamson: May I refer to the findings of fact and conclusions of law and the preliminary injunction, to indicate what I mean about the hearing on the merits?

The Court: Even so, if you are an indispensable party, that could not bind you, could it?

Mr. Williamson: No, but I think it is improper for the Court to take any action whatever if indispensable parties have been omitted. Your Honor, I suggest I be permitted to file these motions, that I file today a brief in support of them, and have your Honor fix dates for filing of briefs by interested parties, and that we go to a full hearing on it.

Mr. Ballard: It seems to us the motion is bad on its face for the very reason your Honor pointed out. It alleges [fol. 107] this petitioner, this movant—he is not a petitioner; he is a movant—that he is an indispensable party. Well, that is as much as to say he cannot be touched by anything done in this litigation.

Mr. Murray: It cannot be a jug-handle affair. He has to come in and enter his general appearance, if he is an indispensable party. Anything in the past is only a temporary injunction. I do not oppose him coming in and enter his general appearance.

The Court: If he is an indispensable party, then anything done to date is void.

Mr. Williamson: That is the position of the Brotherhood.

The Court: Then why a special appearance?

Mr. Williamson: Because the injunction was issued against four hundred members of the Brotherhood of Railroad Trainmen without making them parties and giving them sufficient notice of this proceeding.

The Court: Is that true?

Mr. Ballard: No, it did not run against them in their own right, only to the extent the injunction runs against the employees, agents and servants of the defendants. The extent that they are in that capacity, of course, they are enjoined by the injunction.

Mr. Williamson: There is no doubt at all that is the [fol. 108] effect of it. They are employees of the defendant The Chicago River and Indiana Railroad Company and are commanded by this Court to permit the plaintiffs, that is, these railroads, to move empty cars for loading livestock

other than hogs and sheep with their own power and crews over the lines of the Chicago——

The Court: Why shouldn't they be permitted to move their own cars over their own railroad?

Mr. Williamson: Their own railroad refers to the Chicago River and Indiana Railroad.

The Court: Why shouldn't they be permitted to move their own cars over their own railroad?

Mr. Williamson: Because, as set forth in this affidavit, the Brotherhood of Railroad Trainmen as collective bargaining agents for the 400 employees in yard service of The Chicago River and Indiana Railroad Company, entered into a written contract with The Chicago River and Indiana Railroad Company, giving to such employees the exclusive right to handle those movements of cars.

The Court: Could that contract affect a previously existing order of the Interstate Commerce Commission?

Mr. Williamson: Your Honor, this contract has been in effect for some time. There has been a controversy between the employees and the railroad for years, as to the effect—— [fol. 109] The Court: I am asking you about an order of the Interstate Commerce Commission: Could that contract affect that order?

Mr. Williamson: I am not here to argue the merits, but I would say that contract——

The Court: Then there is no use of having an Interstate Commerce Commission. You might as well turn this over to private bargaining.

Mr. Underwood: Not at all. We never know whether an order we will pass will be respected or not.

The Court: There will be no special appearance here. If you want to file a petition for leave to intervene, you may do so, but there will be no special appearance.

Mr. Williamson: Your Honor, may I present then the motion for the Brotherhood of Railroad Trainmen for leave to file special appearance, and may I present also the motion of the Brotherhood of Railroad Trainmen to vacate the temporary injunction and to dismiss the proceedings for failure to join indispensable parties, and have the——

The Court: You have already presented those, haven't you?

Mr. Williamson: Yes. I want to show, your Honor, that they were presented, and that your Honor denied the motion.

The Court: You want to preserve——

[fol. 110] Mr. Williamson: I want to be given leave to file the special appearance.

The Court: You want to preserve the record.

Mr. Williamson: Yes.

The Court: The Court Reporter has it, and the motion is overruled.

Mr. Williamson: Would your Honor consider setting it down this morning for hearing, before you make your final ruling, and give leave to file briefs, by me and the other parties, before you make a final ruling?

The Court: This isn't a final ruling. This is only a ruling that there will be no special appearance. I told you if you want to file a petition for leave to intervene I will take it under advisement, but I will not permit somebody to come into a lawsuit with a special appearance.

Mr. Williamson: The only purpose of the special appearance is to keep me from being bound by the action already taken.

The Court: You say in the same breath that the action is void for lack of necessary parties. The two positions are not consistent.

Mr. Williamson: We do not wish to take separate action against the railroad, if it makes a violation against this agreement. We want it all disposed of——

[fol. 111] The Court: If it makes a violation of the agreement, why don't you take separate action against them?

Mr. Williamson: There will be a multiplicity of suits, and we think the entire matter can be disposed of if we can come in and not be bound by the action to date.

The Court: If it is void, how can it be binding on you?

Mr. Williamson: I think it is, and I want it dismissed and to start all over again, and give us a chance to come in——

The Court: No. The answer is no.

Mr. Williamson: All right.

Mr. Murray: I don't want to take much time. When this matter came up before the Court the first time I stated that the Trainmen's organization was an indispensable party, and the Court continued the motion properly—I am not saying—until it could be disposed of on a permanent injunction. A temporary injunction was issued. I make no objection now to them coming in in the proper way in this proceeding, by entering their general appearance. That is a

fair way, fair with the Court, fair with us. That is my only objection that I make.

The Court: This Court intended to hold, right or wrong, that a unilateral agreement between a couple of parties can-
[fol. 112] not affect an order of the Interstate Commerce Commission. If that order is bad it must be attacked directly through the means provided by law, and not by a collateral agreement between two parties. That is my intention, to so hold, and that is what I held, so far as I know, unless there is something in the order which I overlooked.

Your position, I take it, is that the Trainmen can make an agreement with one of the parties that will affect, offset an order of the Interstate Commerce Commission which has been in force for many years. I take it that is your position.

Mr. Williamson: That is a question of the merits.

The Court: I don't know why you can't submit it to this Court as a matter of law, and then if it goes to the Circuit Court of Appeals or the United States Supreme Court, it can go on some kind of a simple record.

That is the only question involved, isn't it?

Mr. Williamson: I won't say on the merits that is the only question involved.

The Court: Isn't that substantially?

Mr. Williamson: That certainly is one of the questions.

The Court: Substantially, that is the question?

Mr. Williamson: Because, your Honor, I think there is a [fol. 113] possibility the case should have gone to the Interstate Commerce Commission without ever having come to your Honor.

The Court: That may be. I am not saying that is not true.

Mr. Williamson: That may be one of the points this defendant wishes to raise.

The Court: The only order this Court entered or intended to enter—as I say, there may be something in that order by inadvertence—I can't read the fine print in every order that is presented to me after the parties O. K. it as to form, but it was my intention to hold this matter in status quo until it could be finally decided.

Mr. Ballard: That is all you did.

The Court: And I understand also there is outstanding a controversy between the Trainmen and one of the railroads as against the rest of the railroads, because it is

claimed that this agreement upsets the effect of an order of the Interstate Commerce Commission, that was in force for many years.

The law provides means for repealing and changing orders of the Interstate Commerce Commission. If those means are to be followed, that is probably the proper remedy. Maybe this Court does not have jurisdiction. [fol. 114] Maybe there is an adequate remedy elsewhere, but I will not hold that one party can make any contract with one railroad and upset an order of the Interstate Commerce Commission.

Mr. Williamson: That is a question of the merits which we would like to be heard on.

The Court: If you want to be heard on that, get your general appearance on file, and file your petition for leave to intervene. I will not enter a special appearance.

Mr. Williamson: May I bring in a draft order?

The Court: If you want to file a petition for leave to intervene generally, it might be a way to get this thing to a head.

Mr. Williamson: I will consider that, your Honor.

Mr. Murray: I think I can bring them in, and probably will, the Enginemen, the Trainmen and Firemen, by a motion to bring them in as parties defendant if they won't come in.

The Court: I will not have a special appearance around here or any amicus curiae. People coming in will come in with both feet, and get their feet wet.

Mr. Williamson: I think if this had been called to your Honor's attention by anyone, whether in or out of the court, you could have acted on the motion, and that is what the [fol. 115] brief I propose to file indicates.

The Court: I am only going to run one lawsuit. You are either going to be in or out, either one.

Mr. Williamson: We will consider it further.

The Court: All right, call the next case.

[fols. 116-117] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 118-19] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING LEAVE TO FILE AMENDMENT TO COMPLAINT—April 12, 1946

This cause coming on to be heard on the motion of plaintiffs for leave to file an amendment to the Complaint herein instanter, and due notice having been given to the defendants, and the Court being fully advised in the premises, it is

Ordered that the plaintiffs be, and they hereby are, granted leave to file instanter an amendment to the Complaint herein.

And it is further Ordered that the time for the defendants to answer or otherwise move with respect to the Complaint herein as amended shall stand at April 19, 1946.

Enter: Walter J. La Buy, Judge of the United States District Court.

Dated April 12, 1946.

[fol. 120] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDMENT TO COMPLAINT HEREIN PURSUANT TO LEAVE OF COURT—Filed April 12, 1946

Now came the plaintiffs, and with leave of court first had and obtained, amend their original Complaint herein instanter as follows:

1. By striking our paragraph 7 of said Complaint and inserting in lieu thereof the following paragraph:

> 7. On May 16, 1922, and for many years prior thereto, plaintiffs or their predecessors in interest moved empty livestock cars used for the loading of livestock other than hogs and sheep (herein called stock cars) with their own power and crews from their respective [fol. 121] lines, via their respective connections with the line now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of

loading with their own power and crews over said line, via the connections of said line with their respective lines, and thence to destination as consigned and routed by the shippers. On and immediately prior to May 16, 1922, a charge of $1.00 per car, loaded and empty, was paid by plaintiffs respectively or their predecessors in interest for the privilege of so moving said cars.

The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, (S.) by William F. Price, their Attorney. 120 South La Salle Street, Chicago 3, Illinois.

Ernest S. Ballard, William F. Price, Pope & Ballard, 120 South La Salle Street, Chicago 3, Illinois, Randolph 6680, Attorneys for Plaintiffs.

[fols. 122-123] *Duly sworn to by J. M. Symes. Jurat omitted in printing.*

[fol. 124] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANTS, THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY (herein called the River Road) AND THE NEW YORK CENTRAL RAILROAD COMPANY (herein called the Central) TO PLAINTIFFS' COMPLAINT AS AMENDED —Filed May 6, 1946

First Defense

The complaint fails to state a claim against defendants upon which relief can be granted.

Second Defense

1. These defendants admit that on May 19, 1922, pursuant to the approval and authorization granted in the order of May 16, 1922, the Central purchased the capital stock of

the River Road at a price not exceeding the sum of $750,000 and the River Road leased the property (owned and leased) of the Chicago Junction Railway Company and that ownership of said capital stock by the Central and said lease by the River Road have continued from said date to the present time and are still in effect. These defendants [fol. 125] deny all other allegations and conclusions in paragraph 9 of the plaintiffs' complaint.

2. These defendants deny all of the allegations of paragraph 12 of the plaintiffs' complaint.

3. These defendants admit that on or about January 25, 1946, the River Road notified plaintiffs that on and after February 1, 1946, empty live stock cars (other than for hogs and sheep) destined to places of loading on the line of the River Road in the Union Stock Yards would be moved by the power and crews of the River Road from points of interchange with plaintiffs respectively on the line of the River Road to places of loading, and after they had been loaded at such places of loading, would be moved thence by the power and crews of the River Road to points of interchange with plaintiffs respectively on the line of the River Road, and that at such points they would be delivered by the River Road to plaintiffs respectively, and that on and after February 1, 1946, the River Road would charge and endeavor to collect from plaintiffs respectively as compensation for such switching services not less than $12.96 per outbound loaded car as a division of the joint through rates on carload shipments of livestock other than hogs and sheep from said Union Stock Yards to destinations reached via plaintiffs' respective lines, pursuant to Chicago Switching Committee Division Sheet No. 12-J, issued by R. G. Raasch, Agent, effective June 1, 1945. These defendants deny all other allegations and conclusions of paragraph 13 of the plaintiffs' complaint.

4. These defendants admit that after January 25, 1946, plaintiffs made written protest objecting to the procedure stated in paragraph 3 of this defense. These defendants deny all other allegations and conclusions of paragraph 14 of the plaintiffs' complaint.

5. These defendants admit that on and at all times since February 1, 1946, to and including March 15, 1946, the River Road has caused its employees to fail and refuse and such

employees have failed and refused to throw the switches necessary to permit the power and crews of plaintiffs respectively to place stock cars at loading places on the line of the River Road in the Union Stock Yards and to move [fol. 126] said cars from said loading places and has required plaintiffs' respective crews to place empty stock cars in an interchange yard on the line of the River Road which yard is used by plaintiffs respectively and the River Road for the interchange of cars, and has required plaintiffs respectively to receive such cars, after the same have been loaded, at other points on the line of the River Road, and said cars have been moved by the power and crews of the River Road from said interchange yard to points of loading on the line of the River Road in the Union Stock Yards, and after having been there loaded, back to other points on the line of the River Road, where they have been and are delivered by the River Road to plaintiffs respectively. These defendants deny all other allegations and conclusions of paragraph 15 of the plaintiffs' complaint.

6. These defendants deny all of the allegations of paragraph 16 of the plaintiffs' complaint.

7. These defendants deny all of the allegations of paragraph 17 of the plaintiffs' complaint.

8. These defendants admit that the Union Stock Yards is the largest livestock market and the largest shipping point of livestock in the world and that plaintiffs together with the Central are and have been for many years the principal carriers engaged in the transportation of live stock therefrom to points in the United States east and southeast of Chicago. These defendants allege that as to all other allegations of paragraph 18 of the plaintiffs' complaint, they are without knowledge or information sufficient to form a belief as to the truth of such allegations.

9. These defendants deny all of the allegations of paragraph 19 of the plaintiffs' complaint.

10. These defendants admit that plaintiffs have been, are and will be dependent upon the River Road for the placing of empty live stock cars for loading, and in hauling out loaded cars from places of loading to tracks for interchange with plaintiffs. These defendants deny all other allegations

[fol. 127] and conclusions of paragraph 20 of the plaintiffs' complaint.

11. These defendants deny all of the allegations of paragraph 21 of the plaintiffs' complaint.

12. These defendants admit that on and after February 1, 1946, plaintiffs have been, are and will be required to pay $12.96 (or such amount as is provided by said Division Sheet No. 12-J) instead of $2.00 per loaded car of live stock other than hogs and sheep moving from said Union Stock Yards via plaintiffs' respective lines. These defendants deny all other allegations and conclusions of paragraph 22 of the plaintiffs' complaint.

13. These defendants deny all of the allegations of paragraph 23 of the plaintiffs' complaint.

14. These defendants deny that they, or either of them, have violated condition 3 or any other part of the report and order of the Interstate Commerce Commission of May 16, 1922.

15. These defendants deny that condition 3, set forth in paragraph 8 of the plaintiffs' complaint, is applicable to or imposes any duty upon the defendant, River Road.

16. These defendants deny that any of the acts complained of in the plaintiffs' complaint was done by the defendant, the Central, and further deny that any of said acts so complained of was within the control of the defendant, the Central.

17. These defendants deny that condition number 3 is an order within the meaning of paragraph (12) of section 16 of the Interstate Commerce Act.

Third Defense

1. Certain employees of the River Road who perform work for that company in connection with the moving and switching of cars on its tracks and on the tracks leased to it by the Chicago Junction Railway Company are classed as yard trainmen (hereinafter referred to as trainmen) and for the purposes of the Railway Labor Act (Title 45, U. S. C. A. Sec. 151, et seq.) are represented by a labor [fol. 128] organization known as the Brotherhood of Railroad Trainmen.

2. Prior to January, 1946, said Brotherhood of Railroad Trainmen made demands (allegedly based by said Brotherhood upon a collective bargaining agreement known as the Chicago Memorandum of Agreement, to which said Brotherhood and the River Road were parties) that the work connected with the switching and spotting of stock cars on the tracks of the River Road and on the tracks leased to it by the Chicago Junction Railway Company incidental to the outbound movement of livestock be performed exclusively by employees of the River Road. Prior to January 23, 1946, the River Road consistently declined such demands and, at all times, denied and does now deny that such demands were supported by the said Chicago Memorandum of Agreement.

3. In January, 1946, a strike ballot was prepared by the Brotherhood of Railroad Trainmen and submitted to the trainmen employed by the River Road for their vote for or against a strike, unless the alleged grievances listed in said ballot were settled on a basis satisfactory to the officers of said Brotherhood. Said grievances listed on said ballot included the failure of the River Road to grant said demand that its trainmen perform the work connected with the switching and spotting of stock cars on the tracks of the River Road and on the tracks leased to it by the Chicago Junction Railway Compay incidental to the outbound movement of live stock.

4. The said Brotherhood of Railroad Trainmen subsequently informed the River Road that the trainmen employed by the River Road had voted almost unanimously in favor of such a strike. By letter, dated January 21, 1946, William Bishop, a Vice President of said Brotherhood, advised the River Road that a strike of its trainmen would commence at 10:30 P. M. on Wednesday, January 23, 1946, unless the River Road made settlement of the aforesaid grievances before that time. The River Road immediately sent such information to the Secretary of the National [fol. 129] Mediation Board. On January 23, 1946 the River Road received a telegram from the Secretary of the National Mediation Board stating that the President of the United States had that day created an emergency board to investigate the disputes on the River Road with certain of its employees represented by the Brotherhood of Railroad Trainmen. Subsequently on January 23, 1946, the

aforesaid William Bishop advised the River Road that the strike would proceed as planned notwithstanding the action of the President of the United States aforesaid.

5. On the evening of January 23, 1946 a conference was held between officials of the said Brotherhood of Railroad Trainmen and officers of the River Road. During said conference the said William Bishop stated to the officers of the River Road that unless certain demands, including the aforesaid demands with respect to switching and spotting of cars before and after being loaded with live stock, were granted by the River Road before 10:30 P. M. on said date, not only the trainmen employed by the River Road would strike but employees of other railroads operating in the City of Chicago, Illinois, would probably strike within eight hours after such time. Said Brotherhood officials refused to settle their demands on any basis which would permit the River Road to allow crews of railroads other than the River Road to move live stock cars used for the loading of live stock (other than hogs and sheep) to the places of loading on the lines of the River Road and to move said cars away from such places after loading.

6. At approximately 9:50 P. M. on January 23, 1946, an agreement was executed by the said Brotherhood and the River Road which, among other provisions, contained the following:

> "It is further agreed that foreign line crews will be allowed to come in with their stock, unload and take their empties out with them.
>
> It is further agreed that all stock cars to be loaded will be switched and spotted by C. J. crews and foreign line crews may pick them up from designated tracks to which they have been switched by C. J. crews, effective February 1, 1946.
>
> It is further agreed that foreign line crews will be allowed to bring in their dead freight set out at Ashland Avenue and proceed to the stock chutes, and take their empties back."

[fol. 130] Said agreement was entered into by the River Road solely to prevent the said threatened strike. As a result of said agreement said strike was called off by the said Brotherhood a few minutes before the time set for

it to commence. (A copy of said agreement of January 23, 1946 is attached hereto as Exhibit "A" and made a part hereof.)

7. Said agreement of January 23, 1946 was put into effect by the River Road on February 1, 1946 and as a result thereof trainmen employed by the River Road on and after February 1, 1946 and until March 15, 1946 performed the work incidental to the switching and spotting of live stock cars before and after being loaded on the tracks of the River Road and on the tracks leased to it by the Chicago Junction Railway Company.

Fourth Defense

These defendants adopt and reallege as a part of this defense, as though fully set out herein, the averments contained in the Third Defense above, and further allege that the complaint of plaintiffs fails to state a claim against defendants upon which relief can be granted in that the acts of defendant, the River Road, complained of by plaintiffs were required in the performance of the common carrier duties of said defendant imposed upon it by the Interstate Commerce Act and the Railway Labor Act, as amended, and were necessary in the public interest.

The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, by Sidney C. Murray, Marvin A. Jersild, Their Attorneys, 1236 LaSalle Station, Wab. 4200.

Duly sworn to by Jesse L. McKee. Jurat omitted in printing.

[fol. 131] Received a copy of the above and foregoing answer, together with the Exhibit attached thereto, this 6th day of May, 1946.

E. S. Ballard, William F. Price, Pope & Ballard, Attorneys for Plaintiff.

Received a copy of the above and foregoing answer, together with the Exhibit attached thereto, this 6th day of May, 1946.

Ralph M. Shaw, Guy A. Gladsoe, B. L. Hamilton, Attorneys for Defendant, Chicago Junction Railway Company.

[fol. 132] EXHIBIT "A" TO ANSWER

Chicago, January 23, 1946.

Chicago Junction Railway

(The C. R. & I. R. R. Co., Lessee)

The Chicago River & Indiana Railroad Company

Memorandum

Settlement of claims involved in strike ballot of January 7, 1946 by the Brotherhood of Railroad Trainmen and the Chicago Junction Railway (C. R. & I. R. R. Co. Lessee) Chicago River & Indiana Railroad Company.

1)—Claims 1, 2, 3, 4, 14, 15, 28, 29, 30 and 31 will be Settled on the following bases.

Claims 14, 15, 28, 30 and 31 are withdrawn.

Claims 1, 2, 3, 4 and 29 are settled on the following bases:

It is agreed that crews operating into Chicago Junction Yards will be allowed to set out at two points, namely—Leavitt Street and Ashland Avenue South Yard.

It is further agreed that outbound crews will be allowed to pick up at two points, namely—Leavitt Street and Ashland Avenue North Yard or Loomis Street.

It is further agreed that foreign line crews will be allowed to come in with their stock, unload and take their empties out with them.

It is further agreed that all stock cars to be loaded will be switched and spotted by C. J. Crews and foreign line crews may pick them up from designated tracks to which they have been switched by C. J. Crews, effective February 1, 1946.

(See Note following item 9)

These claims 1, 2, 3, 4 and 29 will be paid.

2)—Claims 5, 6, 7 and 8 shall be settled by allowing crews coupling air at Halsted Street, Ashland Avenue North Yard (including Damen Avenue Yard), Oakley Avenue, Pennsylvania 35th Street Yard and foreign yards a day of eight (8) hours at pro rata rate on dates when such service was performed. At other points an independent allowance of

one hour at pro rata rate will be paid and in future, crews will not couple air in the yards where car men are employed, namely—Halsted Street, Ashland Avenue North Yard (including Damen Avenue Yard), Oakley Avenue, Pennsylvania 35th Street Yard and foreign yards without a written order so to do from the Yardmaster and when so required, will be paid an independent allowance of eight (8) hours' pay at pro rata rates. In other yards where such couplings are made, an independent allowance of one hour's pay at pro rata rates will be made. No allowance of any kind will be made for coupling air hose between caboose and balance of train, between engine and train or between cuts of cars that are doubled where one track would not hold the entire train.

[fols. 133-134] 3)—Claim No. 9—Protest of yardmen account of appointment of yardmasters, etc. The yardmen involved will be given a seniority date on the Yardmasters' Seniority Roster in each case immediately preceding the date of the yardmasters junior to the man involved.

4)—Claims 10, 11, 12, 25, 26—These claims are withdrawn.

5)—Claim No. 13: Claim of Yard Foreman Davlin and others, etc. This claim will be settled on the basis of paying one crew one day's pay at pro rata rates on dates when the work alleged in this claim was performed.

6)—Claims 16, 17, 19, 21, 22, 23, 24, 27, 32 and 34 will be paid.

7)—Claims 18 and 33 will be paid.

8)—Claim No. 35: Claim of unassigned yardmen for a minimum day, etc. Starting with January 1, 1942 one unassigned yardman will be allowed a day's pay at foreman's rate (eight (8) hours at pro rata rates) on each date that such self-propelled machine was operated as alleged in this claim, in full settlement thereof.

9)—Claim of F. Andziewicz, F. E. Kazmer, etc. will be paid. This claim is No. 20 on the ballot.

Note: In connection with Item 1; It is further agreed that foreign line crews will be allowed to bring in their

dead freight set out at Ashland Avenue and proceed to the stock chutes, and take their empties back.

Signed this 23rd day of January, 1946 at Chicago, Illinois.

(S.) J. L. McKee, Vice President New York Central Railroad Co., Chicago Junction Railway (C. R. & I. R. R. Co. Lessee), Chicago River & Indiana Railroad Company. William Bishop, Vice President Brotherhood of Railroad Trainmen.

[fol. 135] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO INTERVENE AS DEFENDANT—Filed May 20, 1946

To the Honorable Elwyn R. Shaw, Judge of Said Court:

Now comes Applicant, the Brotherhood of Railroad Trainmen, an unincorporated association, hereinafter sometimes referred to as the Brotherhood, and moves for leave to intervene as Defendant in this proceeding and alleges as follows:

1. The Brotherhood now acts and for many years last past has acted as collective bargaining representative for all persons employed as trainmen by the Defendant The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act (45 U. S. C. A. Chap. 8). As a result of such collective bargaining said employees, through the Brotherhood, entered into an agreement with said Defendant carrier concerning [fol. 136] rates of pay, rules, and working conditions, known as "Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement" which is now and has been in effect for several years last past. Under the terms of this agreement said employees are entitled to all work performed by trainmen on the lines of said Defendant carrier.

2. In spite of the provisions of the aforesaid agreement as to rates of pay, rules, and working conditions, the Defendant The Chicago River and Indiana Railroad Company for

many years permitted employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of the Defendant The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars had been loaded, so to move the same from said points of loading over the line of said carrier to lines of said other railroads.

3. As a result of the practice described in the preceding paragraph, employees as trainmen of the Defendant The Chicago River and Indiana Railroad Company for some time protested through the Brotherhood to said carrier against this violation of their agreement concerning rates of pay, rules, and working conditions. Such employees of said carrier made protest and, as set forth in paragraph 15 of the STIPULATION OF FACTS heretofore filed by the other parties herein, notified said carrier that unless this labor dispute, and certain other labor disputes, were [fol. 137] settled before 10:30 P. M. January 23, 1946 such employees would go out on strike at that hour. On that date the Brotherhood, through William Bishop, its Vice President, and Felix E. Kazmer, General Chairman, Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company, effected a written settlement with said carrier of this controversy on behalf of the employees as trainmen of said carrier. This settlement was in the form of a written interpretation made under the provisions of the existing agreement described in paragraph 1 above. This settlement interpretation is that referred to in paragraph 15 of the STIPULATION OF FACTS heretofore filed by the parties herein. By the terms of this settlement interpretation said carrier put an end to the practice of permitting employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of the Defendant The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars have been loaded, so to move the same from said points of loading over the lines of said carrier to lines of said other railroads. Further, as a result of this settlement interpretation, said work was to be performed by the employees as trainmen, engineers, and fire-

men and enginemen of said Defendant The Chicago River and Indiana Railroad Company. Said work was so performed in accordance with the said settlement interpretation until such employees were illegally, wrongfully and improvidently enjoined therefrom, without notice or opportunity to be heard, by order entered herein on March 14, 1946.

[fol. 138] 4. The Complaint in this proceeding was filed February 12, 1946. This suit involves and grew out of the above-described labor dispute. It seeks affirmative injunctive relief against the Defendant The Chicago River and Indiana Railroad Company and its employees to command them to permit the plaintiff railroad companies to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of said Defendant carrier to points of loading on its lines in the Union Stock Yards and, after such cars have been loaded, to move them from the points of loading over the lines of said Defendant carrier to the lines of the plaintiff railroad companies. It was and is, therefore, the primary purpose of this suit to nullify the above-described settlement interpretation of the employees' agreement concerning rates of pay, rules, and working conditions, and thus to alter the agreement itself, so as to deprive the employees of said Defendant carrier of their property rights under said agreement by enjoining them from performing the work to which they are entitled thereunder, in a suit to which they are not made parties, all without notice to said employees and without affording them an opportunity to be heard, and without compliance with the laws relating to injunctions in labor disputes, and notwithstanding that the employees of said Defendant carrier are actually the persons adversely affected by the relief sought by Plaintiffs, and are therefore the real parties in interest as defendants herein.

5. On February 18, 1946 there was filed herein the appearance of Sidney C. Murray as attorney for the Defendants [fol. 139] The Chicago River and Indiana Railroad Company and the New York Central Railroad Company.

6. On February 21, 1946 an order was entered herein on the motion of the Interstate Commerce Commission granting it leave to intervene as a party plaintiff and to file a complaint of intervention.

7. On February 21, 1946 the motion of the Plaintiffs for a preliminary injunction was taken under advisement, and the parties were granted leave to file an agreed statement of facts and briefs by February 26, 1946.

8. On February 25, 1946 a STIPULATION OF FACTS was filed. On the same day the motion of the Interstate Commerce Commission, intervening Plaintiff, for a preliminary injunction was taken under advisement.

9. On March 14, 1946 an order was entered making findings of fact and conclusions of law, and a preliminary injunction was issued as requested by Plaintiffs. Bond was fixed in the sum of $10,000. The motion of the Defendant Chicago Junction Railway Company to dismiss it as a party defendant was continued to the final hearing.

10. On March 18, 1946 the motion of the Brotherhood of Railroad Trainmen to file its special appearance and motion to vacate the temporary injunction and dismiss the proceedings for failure to join indispensable parties was denied.

11. On March 26, 1946 the Defendant Chicago Junction [fol. 140] Railway Company filed its notice of appeal against the refusal of the court to dismiss the action as to that Defendant, and in April, 1946 this appeal was perfected.

12. On April 12, 1946 a order was entered giving Plaintiffs leave to file instante an amendment to the Complaint, and such amendment was filed. The amendment did not change the relief sought. On April 16, 1946 an order was entered by stipulation extending the time for the Defendants The Chicago River and Indiana Railroad Company and the New York Central Railroad Company to plead to and including May 10, 1946, and such Defendant filed their answer to the Complaint, as amended, on May 6, 1946.

13. The Brotherhood of Railroad Trainmen may properly act in a representative capacity in this litigation for employees as trainmen of the Defendant The Chicago River and Indiana Railroad Company.

14. The Brotherhood has a right to intervene because it is an indispensable party herein and it also has a right to

intervene under Rule 24(a) of the Rules of Civil Procedure for District Courts of the United States, as follows:

(1) A statute of the United States confers on it an unconditional right to intervene (49 U. S. C. A. 17 (11));

(2) The representation of the Brotherhood's interest herein by the Defendants The Chicago River and Indiana Railroad Company and the New York Central Railroad Company is inadequate, particularly as follows:

(a) To the extent that Plaintiffs' Complaint herein seeks [fol. 141] to relieve said Defendants of their duties and obligations under the said settlement interpretation by enjoining them from performing the same, said Defendants have an interest which is adverse to the Brotherhood and which is in common with Plaintiffs' interest herein;

(b) Said Defendants did not oppose the intervention of the Interstate Commerce Commission as a party plaintiff herein, notwithstanding that such intervention was improper for the following reasons:

The effect of such intervention was to relieve plaintiff railroads of the necessity of proving injury as alleged in their Complaint, which they were bound to do under the provisions of the Interstate Commerce Act (49 U. S. C. A. 16 (12));

Said Act does not permit the Interstate Commerce Commission to join with individual railroads for the purpose of suing to enjoin alleged violations of a Commission order;

Said Act also provides (49 U. S. C. A. 5 (2) (f) that, notwithstanding any of the other provisions thereof, agreements between a carrier and its employees pertaining to the protection of the interests of the employees may be entered into at any time, and therefore the said Commission has no right to take a partisan position, in company with certain individual carriers, and to align itself with them to urge such an interpretation of a Commission order as will deny to railroad employees the right to make an agreement with their employer through collective bargaining and pursuant to said Act; and

[fol. 142] Said Commission has no right under 29 U. S. C. A. 51-53 or under the Norris-LaGuardia Act

(29 U. S. C. A. 101-115) to become a party plaintiff in a suit for the issuance of an injunction growing out of or involving a labor dispute.

(c) Said Defendants filed no answer in opposition to Plaintiff's Complaint, as amended, until May 6, 1946;

(d) Said Defendants presented no witnesses at any hearing in opposition to Plaintiffs' application for a preliminary injunction, or otherwise, and said Defendants confined themselves to signing and filing with the then parties to this suit a Stipulation of Facts which was wholly inadequate to indicate to the Court that this suit involves and grew out of a labor dispute and that any action taken by the Court must be in compliance with the laws relating to injunctions in labor disputes;

(e) Said Defendants have not invited the Court's attention to the applicability of 29 U. S. A. 51-53 or of the Norris-LaGuardia Act (29 U. S. C. A. 101-115) or to the case of *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc* (126 Fed. (2d) 931, C. C. A. 10th, 1942; certiorari denied in 317 U. S. 645, 87 L. Ed. 519), which said Acts and decision are clearly applicable to the issues herein and would, if applied, require dismissal of Plaintiffs' Complaint;

(f) Said Defendants have not invited the Court's attention to the applicability of the case of *Gulf, Mobile &* [fol. 143] *Northern Railroad Company* v. *Illinois Central Railroad Company*, (21 Fed. Supp. 282 (District Court Tennessee 1937; appeal dismissed by stipulation in 109 Fed. 2d 1016) which decision is also clearly applicable to the issues involved herein and would, if applied, require dismissal of Plaintiffs' Complaint;

(g) Said Defendants have not invited the Court's attention to 49 U. S. C. A. 5 (2) (f), a statutory provision which is so clearly adverse to Plaintiffs' case that Plaintiffs in their brief in support of their motion for a preliminary injunction believed it necessary to devote two pages in an attempt to show it inapplicable. (pp. 18, 19, and 20.) Further, the Defendant New York Central Railroad Company itself made an agreement on April 22, 1946 with its employees pursuant to this statute in connection

with acquisition by the Baltimore and Ohio Railroad Company of certain trackage rights between Toledo, Ohio and Detroit, Michigan.

(h) Said Defendants made only formal objection to the preliminary injunction order of March 14, 1946 even though certain findings of fact and conclusions of law therein contained constituted in effect a decision of the case on the merits as it then stood. The findings and conclusions referred to by the Applicants in the preliminary injunction order are as follows: Paragraph 13 of the Findings of Fact; paragraphs 4, 8, 10, and 11 of the Conclusions of Law. Further, said order fixed Plaintiffs' bond in the sum of only $10,000, a wholly inadequate amount;

(i) Said Defendants have taken no action to force the Plaintiffs to amend their Complaint to join the Brotherhood [fol. 144] as a party defendant, even though said Defendants have stated in open Court that they regarded the Brotherhood as an indispensable party. After the Court on March 18, 1946 denied the motion of the Brotherhood of Railroad Trainmen to file its special appearance and motion to vacate the temporary injunction and dismiss the proceedings for failure to join indispensable parties, which first motion was opposed by said Defendants, the Brotherhood inquired of said Defendants on March 23, 1946 whether they would take action to require the Plaintiffs to join that Brotherhood as a party defendant, and stated that the Brotherhood would seek to intervene if said Defendants did not take such action. Said Defendants stated then and on two subsequent occasions that it was their present intention to take such action by the filing of a petition at an early date, and, at the same time, to seek to require that the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen also be joined. Said Defendants failed to file such a petition. On April 15, 1946 the Brotherhood, through its attorneys, made written inquiry of the attorney for said Defendants as to whether and when said Defendants would file such petition, but has received no reply from such attorney. On May 6, 1946 said Defendants filed their Answer to Plaintiffs' Complaint, as amended, but did not in said Answer allege that the Brotherhoods mentioned or any of them were indispensable parties. The Brotherhood must therefore assume that said Defendants will

take no action to force the Plaintiffs to make any of the Brotherhoods parties to this litigation. The Brotherhood believes that the early disposition of this litigation would [fol. 145] have been served if said Defendants had filed a petition to force the Plaintiffs to join said Brotherhoods as parties, and the Brotherhood will not take such action with respect to the said two other Brotherhoods;

(j) The preliminary injunction entered herein commands employees of the Defendant The Chicago River and Indiana Railroad Company to permit Plaintiffs to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of that carrier to points of loading on that line in the Union Stock Yards and, after such cars have been loaded, so to move the same from said points of loading over the lines of that carrier to Plaintiffs' lines. Plaintiffs request the same permanent relief against said employees, who therefore may be bound by judgment entered herein.

15. The Brotherhood alleges, in the alternative, that it should be permitted to intervene under Rule 24(b) of the Rules of Civil Procedure for District Courts of the United States as follows:

(1) A statute of the United States confers a conditional right to intervene. (49 U. S. C. A. 17 (11).)

(2) Applicant's claim or defense and the main action have a question of law or fact in common in that Plaintiffs' claim as to the legal effect of the order of the Interstate Commerce Commission of May 16, 1922 as to the operations of the Defendant The Chicago River and Indiana Railroad Company necessarily carries with it the question of the legal effect of this order with respect to the relations of the said carrier and its employees.

[fol. 146] 16. The intervention sought will not unduly delay or prejudice the adjudication of the rights of the original parties.

17. Attached hereto is copy of Motion of Brotherhood of Railroad Trainmen to Vacate Preliminary Injunction, to Assess Damages Against Plaintiffs, and for Summary Judgment. This pleading sets forth the present claim or defense for which intervention is sought.

Wherefore, the Brotherhood, as Applicant, prays that an order may be entered granting it leave to intervene as Defendant and to file instanter the attached Motion, and granting it such other and further relief as may be just.

Dated: May 11, 1946.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Applicant, 39 S. LaSalle St., Chicago 3, Illinois. Franklin 2411.

[fol. 147] District of the United States,
State of Illinois,
County of Cook, ss:

Now comes Felix E. Kazmer and, being first duly sworn, deposes and says that:

1. He is now serving and has for several years last past served as General Chairman of Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company. He is an employee of the Chicago River and Indiana Railroad Company. He resides in the City of Chicago, State of Illinois.

2. He has read the above and foregoing Motion, knows the contents thereof, and the same is true, except as to statements of action taken in this proceeding and of legal conclusions, as to which matters he is without adequate knowledge to make affidavit.

Felix E. Kazmer.

Subscribed and sworn to before me this 11th day of May, 1946. Lucile M. Ingham, Notary Public. (Seal.)

[fol. 148] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO VACATE PRELIMINARY INJUNCTION, TO ASSESS DAMAGES AGAINST PLAINTIFFS, AND FOR SUMMARY JUDGMENT

To the Honorable Elwyn R. Shaw, Judge of Said Court:

Now comes the Defendant the Brotherhood of Railroad Trainmen, an unincorporated association, hereinafter sometimes referred to as the Brotherhood, and invites attention to the Affidavit hereto attached and made a part hereof, and moves the Court to:

1. Vacate the preliminary injunction entered herein on March 14, 1946:

(a) For failure to join indispensable parties prior to the issuance of said injunction and prior to any hearings had on Plaintiffs' application therefor, especially as follows:

[fol. 149] (1) When such injunction was entered on that date no employee as trainman, engineer, fireman, or engineman of the Defendant The Chicago River and Indiana Railroad Company, or any qualified representative of any such employee, was a party to this proceeding;

(2) Employees as trainmen, engineers, firemen and enginemen of the Defendant The Chicago River and Indiana Railroad Company, or their qualified representatives, were and are indispensable parties to this proceeding;

(3) In the absence of such employees or their representatives as parties herein the Court lacked jurisdiction over the subject matter of the within suit;

(4) The issuance of a preliminary injunction in a suit of which the Court lacked jurisdiction was improper, and said injunction was improvidently issued.

(b) For failure to comply with the provisions of 29 U. S. C. A. 51-53 or with the provisions of the Norris-LaGuardia Act (29 U. S. C. A. Sec. 101-115) regarding

jurisdiction of United States Courts to issue injunctions in cases involving or growing out of labor disputes, particularly as follows:

(1) No testimony of witnesses was heard in open court (with opportunity for cross-examination) in support of the Complaint, and no opportunity was afforded for testimony in opposition thereto;

(2) No finding was made, based on competent evidence as aforesaid, that unlawful acts have been [fol. 150] threatened or committed and will be committed or continued unless restrained;

(3) No finding was made, based on competent evidence as aforesaid, that substantial and irreparable injury to Plaintiffs' property will follow;

(4) No finding was made, based on competent evidence as aforesaid, that as to each item of relief granted greater injury will be inflicted upon Plaintiffs by denial of relief than will be inflicted upon Defendants by the granting of relief;

(5) No finding was made, based on competent evidence as aforesaid, that the public officers charged with the duty of protecting Plaintiffs' property are unable or unwilling to furnish adequate protection;

(6) Notice of the hearing on Plaintiffs' application for said injunction was not given or directed to be given to all known persons against whom relief was sought or allowed, including the employees of Defendant The Chicago River and Indiana Railroad Company, who were sought to be and were enjoined, nor was such notice given or directed to be given to the public officials charged with the duty to protect Plaintiffs' property;

(7) A bond was not filed by Plaintiffs in an amount sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erro- [fol.151] neous issuance of said injunction, including all reasonable costs, attorneys' fees and expenses of defense; and

(8) No finding was made, based on competent evidence as aforesaid, that Plaintiffs have complied with all obligations imposed upon them by law involved in

the labor dispute herein, and have made every reasonable effort to settle such dispute.

2. Assess against the Plaintiffs and their sureties all costs and damages incurred or suffered by employees as trainmen of the Defendant The Chicago River and Indiana Railroad Company, including their attorneys' fees, arising out of the wrongful and improvident issuance of the preliminary injunction herein.

3. Grant a summary judgment in favor of this Defendant under Rule 56(b) of the Rules of Civil Procedure for District Courts of the United States:

(a) For lack of jurisdiction over the subject matter, inasmuch as no employee as engineer, fireman, or engineman of the Defendant The Chicago River and Indiana Railroad Company, or any qualified representative of any such employee, is a party to this proceeding and such employees, or their qualified representatives, are indispensable parties to this proceeding.

(b) For failure to state a claim upon which relief can be granted in that:

(1) Plaintiffs' Complaint, as amended, does not contain allegations which satisfy the mandatory require- [fol. 152] ments of 29 U. S. C. A. 51-53 or of the Norris-LaGuardia Act (29 U. S. C. A. 101-115) on which testimony could be heard or findings might be based as set forth in sub-paragraph 1(b) above.

(2) Plaintiffs' Complaint, as amended, does not contain allegations of any violation of the order of the Interstate Commerce Commission of May 16, 1922, as amended, and of the agreement of the Defendant carriers arising out of said order, and of the Interstate Commerce Act; or, in the alternative.

(3) If Plaintiffs' Complaint, as amended, be held to contain allegations of a violation of the order of the Interstate Commerce Commission of May 16, 1922, as amended, then this Court should not enjoin such violation for the reasons that:

The Commission did not have jurisdiction to issue such order;

The amendment to the Interstate Commerce Act found in 49 U. S. C. A. 5 (2) (f) is applicable; and

The public interest requires that no injunction be issued.

4. Grant the Brotherhood leave in its discretion to answer the allegations of the Complaint, as amended, if the Motion for Summary Judgment be denied.

[fol. 153] 5. Grant the Brotherhood such other and further relief as may be just.

Dated: May 11, 1946.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois, Franklin 2411.

[fol. 154] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF FELIX E. KAZMER

Now comes Felix E. Kazmer and, being first duly sworn, deposes and says:

1. He is now serving and has for several years last past served as General Chairman of Brotherhood of Railroad Trainmen, The Chicago River and Indiana Railroad Company, Lessee of Chicago Junction Railway Company. He is also Chairman of the Joint Committee of the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Engineers, and the Brotherhood of Locomotive Firemen and Enginemen, The Chicago River and Indiana Railroad Company. He is an employee of The Chicago River and Indiana Railroad Company. He resides in the City of Chicago, State of Illinois. He makes this Affidavit on personal knowledge.

2. The Brotherhood of Railroad Trainmen now acts and for many years last past has acted as collective bargaining representative for all persons employed as trainmen by The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act. As a

[fol. 155] result of such collective bargaining said employees, through said Brotherhood, entered into an agreement with said carrier concerning rates of pay, rules, and working conditions known as "Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement" which is now and has been in effect for several years last past. A true and correct copy of this Agreement is attached hereto, marked "Exhibit A," and made a part hereof. Under the terms of this agreement said employees are entitled to all work performed by trainmen on the lines of said carrier.

3. The Brotherhood of Locomotive Engineers now acts and for many years last past has acted as collective bargaining representative for all persons employed as engineers by The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act. As a result of such collective bargaining said employees, through said Brotherhood, entered into an agreement with said carrier concerning rates of pay, rules, and working conditions, known as "Schedules of Wages and Articles of Agreement between Chicago Junction Railway, The Chicago River and Indiana Railroad Company and Engineers" which is now and has bee in effect for several years last past. As a result of this agreement said employees are entitled to all work performed by engineers on the lines of said carrier.

4. The Brotherhood of Locomotive Firemen and Enginemen now acts and for many years last past has acted as collective bargaining representative for all persons employed as firemen and enginemen by The Chicago River and Indiana Railroad Company, in accordance with the provisions of the Railway Labor Act. As a result of such collective bargaining said employees, through said Brotherhood, entered into an agreement with said carrier concerning rates of pay, rules, and working conditions, known [fol. 156] as "Schedule of Wages and Articles of Agreement between the Chicago Junction Railway Company and The Chicago River and Indiana Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen" which is now and has been in effect for several years last past. As a result of this agreement said employees are entitled to all work performed by firemen and enginemen on the lines of said carrier.

5. In spite of the provisions of the three aforesaid agreements as to rates of pay, rules, and working conditions, The Chicago River and Indiana Railroad Company for many years permitted employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars have been loaded, so to move the same from said points of loading over the lines of said carrier to lines of said other railroads.

6. As a result of this practice, employees as trainmen, engineers, and firemen and enginemen of The Chicago River and Indiana Railroad Company for some time protested through their respective Brotherhoods to said carrier against this violation of their respective agreements concerning rates of pay, rules, and working conditions. Employees as trainmen of said carrier, in particular, made protest and, as set forth in paragraph 15 of the Stipulation of Facts heretofore filed by the parties herein, notified said carrier that unless this labor dispute, and certain other labor disputes, were settled before 10:30 P. M. January 23, 1946 such employees would go out on strike at that hour. On that date the Brotherhood of Railroad Trainmen, through William Bishop, its Vice-President, and Felix E. Kazmer, General Chairman, Brotherhood of [fol. 157] Railroad Trainmen, The Chicago River and Indiana Railroad Company, lessee of Chicago Junction Railway Company, effected a written settlement with said carrier of this controversy on behalf of the employees as trainmen of said carrier. This settlement was in the form of a written interpretation made under the provisions of the existing agreement described in paragraph 2 above. This settlement interpretation is that referred to in paragraph 15 of the Stipulation of Facts heretofore filed by the parties herein. By the terms of this settlement interpretation said carrier put an end to the practice of permitting employees of other railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of the Defendant The Chicago River and Indiana Railroad Company to points of loading on said lines in the Union Stock Yards, Chicago, Illinois, and, after such cars have been loaded, so to move

the same from said points of loading over the lines of said carrier to lines of said other railroads. Further, as a result of this settlement interpretation, said work was to be performed by the employees as trainmen, engineers, and firemen and enginemen of said carrier. Said work was so performed in accordance with the said settlement interpretation until such employees of the Defendant The Chicago River and Indiana Railroad Company were, on March 14, 1946, without previous notice, enjoined from performing such work by order of the above District Court. The first and only notice or other process relative to any proceedings had in the above suit which was served upon any of the above-named Brotherhoods, or any of their members, was on March 14, 1946, when each of said Brotherhoods was furnished a copy of the preliminary injunction hereafter described.

7. On March 14, 1946 a preliminary injunction was [fol. 158] entered herein commanding The Chicago River and Indiana Railroad Company and its employees to permit certain "foreign" railroads to move empty cars for loading livestock other than hogs and sheep with their own power and crews over the lines of The Chicago River and Indiana Railroad Company to points of loading on that line in the Union Stock Yards and after such cars have been loaded so to move the same from said points of loading over the lines of that carrier to the "foreign" lines.

8. The Chicago River and Indiana Railroad Company and its employees are obeying that injunction and as a result said carrier is again violating the three aforesaid agreements as to rates of pay, rules, and working conditions now in effect between that carrier and its employees as trainmen, engineers, and firemen and enginemen.

9. The said violation of the three aforesaid agreements as to rates of pay, rules, and working conditions has brought widespread dissatisfaction to employees of The Chicago River and Indiana Railroad Company in service as trainmen, engineers, and firemen and enginemen. Such employees are losing work to which they are entitled and wages therefor believed to be in excess of $200 per day. Such employees are, now filing time claims against said carrier arising out of such violation but have been paid nothing

on account thereof and, unless such claims are paid, further dissatisfaction will result among said employees. Affiants believe that these conditions may bring serious results in the operations of said carrier and, in addition, may result in serious consequences to other railroads using the lines of said carrier, all of which may adversely affect the public interest.

10. The Brotherhood has employed the firm of Adams Nelson & Williamson, attorneys at law, 39 South LaSalle [fol. 159] Street, Chicago, Illinois, to represent it in this proceeding and has agreed to pay to said attorneys the reasonable value of their services rendered and to be rendered herein.

Felix E. Kazmer.

Subscribed and sworn to before me this 1th day of May, 1946. Lucile M. Ingham, Notary Public. (Seal.)

[fol. 160] EXHIBIT "A" TO AFFIDAVIT

Rules and Rates of Pay of Yardmen

Chicago Switching District

The Chicago Memorandum of Agreement

[fol. 161] Memorandum of Agreement between Brotherhood of Railroad Trainmen and General Managers' Committee representing the following named railroads:

Atchison, Topeka & Santa Fe Railroad.
Baltimore & Ohio Railroad.
Chesapeake & Ohio Railroad of Indiana.
Chicago & Alton Railroad.
Chicago & Western Indiana Railroad.
Chicago & Northwestern Railroad.
Chicago, Burlington & Quincy Railroad.
Chicago Junction Railroad.
Chicago, Milwaukee & St. Paul Railroad.
Chicago, Indianapolis & Louisville Railroad.
Chicago & Erie Railroad.
Indiana Harbor Belt Railroad.
Illinois Central Railroad.
New York Central Railroad.
New York, Chicago & St. Louis Railroad.

Pittsburgh, Cincinnati, Chicago & St. Louis Railroad.
Pittsburgh, Fort Wayne & Chicago Railroad.
The Belt Railroad of Chicago.
Wabash Railroad.

The following Rates of Pay, Rules and Regulations will apply to yardmen and switchtenders in the Chicago Switching District, and shall be transmitted to the railroads represented, to be incorporated in their individual schedules:

[fol. 162] Article I

Rates of Pay

(a)	Per Day	Overtime Rates Per Hour
Car Retarder Operator	$9.86	$1.84⅞
Foreman	9.06	1.69⅞
Helper	8.54	1.60⅛
Switchtender	6.99	1.30⅞

Where rules of existing schedule agreement provide that switchtenders are paid helpers' rates, such rules will be continued.

Note—Revised rates of pay, effective October 1, 1937, and rate of pay for car retarder operator added to original agreement.

Pilots Pay

(b) Regular pilots will receive not less than yard foremen's pay.

Yardmen required to perform incidental pilot service during the day will receive yard foreman's rate for the entire day's work.

Back-up Pay

(c) Except where passenger back-up work is now performed by passenger train crews, the back-up lead man shall receive yard foremen's rate, and the helpers yard helper's rate.

Passenger back-ups will be handled by one or more men as may be required by the company.

Article II

Basic Day Overtime

(a) Eight hours or less shall constitute a day's work.

(b) Except when changing off where it is the practice to [fol. 163] work alternately days and nights for certain periods, working thru two shifts to change off; or where exercising seniority rights from one assignment to another; or when extra men are required by schedule rules to be used, all time worked in excess of eight hours continuous service in a twenty-four hour period shall be paid for as overtime, on the minute basis at one and one-half times the hourly rate.

Assignments

(c) Yardmen shall be assigned for a fixed period of time which shall be for the same hours daily for all regular members of a crew. So far as it is practicable assignments shall be restricted to eight hours' work.

Article III

Defining Yard Work

(a) The following shall be considered yard work, shall be handled by yardmen and shall be compensated for at not less than yard rates.

(b) The switching of all freight and passenger equipment operating exclusively within the switching limits;

(c) The transfer of all freight and passenger equipment operating exclusively within the switching limits;

(d) The handling of all construction and maintenance of way trains operating exclusively within the switching limits;

(e) The handling of all work trains and milk trains operating exclusively within the switching limits;

(f) The handling of all pay car service operating exclusively within the switching limits (by a regularly assigned yard crew);

(g) All pilot service required for yardmen operating exclusively within the switching limits;

[fol. 164] (h) Where regularly assigned to perform service within switching limits yardmen shall not be used in

road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the greater, with a minimum of one hour, for the class of service performed, in addition to the regular yard pay, and without any deduction therefrom for the time consumed in said service.

(i) United States Railroad Administration, Washington, October 24, 1919.

Supplement No. 23 to General Order No. 27

(a) Effective October 1, 1919, employees, (excluding locomotive crane operators and wrecking derrick engineers) who are assigned to operate shop-yard engines will be paid the yard rates of wages and operated under the yard-service rules as are specified in supplements Nos. 15 (engineers and firemen) and 16 (yardmen) to General Order No. 27, and such service shall be incorporated into the respective agreements on all roads in Federal operation.

(b) This order is without prejudice to the seniority rights of employes who are now assigned to shop-yard engines. Only as vacancies occur and new positions are created they will be filled from the seniority rosters of the engineers, firemen and yardmen.

(c) Rates of wages that are higher or rules for overtime that are more favorable to employes than those hereby established shall be preserved.

Walker D. Hines, Director General of Railroads.

Article IV

Pay to Starting Point Reporting and Not Used

(a) Pay of yardmen shall continue until they return to the point at which they started work.

[fol. 165] Yardmen reporting for duty after being called, and not performing service, will be paid for one day. This will not affect the present practice of requiring extra men to report morning and evening to find if work is available.

Pay from Point of Assignment

(b) Extra yardmen will receive compensation from the point of their assignment.

Assigned to Other Duties

(c) Yardmen assigned to other than their regular duties will be paid the established rate for the service performed, but in no case shall a yardman so assigned be paid less than on the basis of their regular rates.

Article V

Lunch Time

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work without deduction in pay.

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

(c) Paragraphs (a) and (b) of this Article apply to switchtenders, but switchtenders will be held responsible for their regular duties during the lunch period.

Article VI

Starting Time

(a) Regularly assigned yard crews shall each have a fixed starting time and the starting time of a crew will not be changed without at least 48 hours, advance notice. Practices on individual roads as to handling of transfer crews are not affected by this section.

[fol. 166] (b) Where three eight-hour shifts are worked in continuous service, the time for the first shift to begin work will be between 6:30 A. M. and 8:00 A. M.; the second 2:30 P. M. and 4:00 P. M.; and the third 10:30 P. M. and 12:00 midnight.

(c) Where two shifts are worked in continuous service the first shift may be started during any one of the periods named in Section (b).

(d) Where two shifts are worked not in continuous service the time for the first shift to begin work will be between the hours of 6:30 A. M. and 10:00 A. M., and the second not later than 10:30 P. M.

(e) Where an independent assignment is worked regularly the starting time will be during one of the periods provided in Sections (b) or (d).

(f) At points where only one yard crew is regularly employed, it can be started at any time, subject to Section (a).

(g) The time for fixing the beginning of assignments or meal periods is to be calculated from the time fixed for the crew to begin work as a unit without regard to preparatory or individual duties.

Article VII

Consist of Crews

A yard crew shall consist of not less than one foreman and two helpers, and yardmen will not be required to work with less than a full crew as specified above.

Article VIII

Working 16 Hours

Yardmen required to work sixteen hours will resume work when their rest period is up under the law and their pay will begin at their established starting time.

[fol. 167]

Article IX

Allowance for Attending Court, etc.

(a) Yardmen or switchtenders attending court or inquests under instructions from the company will be allowed the same compensation they would have earned had they remained on their regular assignment, plus actual expenses. Extra men so used will be allowed a minimum day, plus actual expenses. Money so earned shall be paid not later than the next regular pay day.

Attending Investigations

(b) Yardmen or switchtenders required by the company to be present as witnesses at investigations, other than those covered by Article XXI, will be paid for all time lost plus expenses.

Re-Examinations

(c) Yardmen or switchtenders who are required to attend re-examinations on Rules and Regulations will, when attending such re-examinations on their own time, be paid their regular hourly rates for the actual time required to be present.

Article X

Seniority Privileges

(a) Seniority rights of yardmen will date from the time they enter the service continuous in yards or terminal where employed.

Yardmen

(b) The right to preference of work and of promotion will be governed by seniority in service. The yardmen oldest in service will be given the preference, if competent.

(c) In the appointment of Yardmasters and Assistant Yardmasters the senior yardman will, in all cases, be given full and unprejudiced consideration.

[fol. 168]

Switchtenders

(d) Seniority rights of switchtenders will date from the time they enter the service continuous in yards or terminal where employed.

(e) The right to preference of work will be governed by seniority in service. The switchtender oldest in service will be given preference providing the applicant is competent.

Article XI

Seniority Lists

(a) Correct seniority lists of yardmen and switchtenders shall be furnished Local Chairmen every ninety days, and copies shall be posted in convenient places in yard offices, to which yardmen and switchtenders shall have access at all times. A list shall also, each thirty days, be given to the Local Chairman showing all names removed from the seniority lists, and the reason for such removal; also a record of men on leave of absence for 30 days or over.

Crew Bulletin

(b) Separate bulletins shall be kept in each yard office upon which assigned crews, switchtenders and extra men shall be registered.

Article XII

Employment

(a) Applications of yardmen and switchtenders for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted.

Physical Examinations

(b) On roads requiring same, all physical examinations of applicants shall be made without expense to the person examined, unless he shall pass such examination and be [fol. 169] continued in service not less than thirty days. The entire fee for such examination shall not exceed one dollar. The applicant shall be notified within ten days of the result of his physical examination, and if not so notified, he will be considered physically qualified.

Article XIII

Leaving Service

(a) Yardmen or swi-chtenders leaving the service of the company of their own accord forfeit all seniority rights and shall not be reinstated.

Service Letter

(b) Any yardman or switchtender leaving the employ of the company will, at his request, be given a letter by his Division or Terminal Superintendent stating his term of service and capacities in which employed.

Leave of Absence

(c) Yardmen or switchtenders will not be granted leave of absence for a longer period than ninety days, except in case of sickness of himself or member of his family or when serving on the Committee.

Article XIV

Switchtenders Positions

(a) In filling temporary vacancies of switchtenders, and no extra switchtenders available, the senior available extra yardman will be given preference.

(b) In filling vacancies in position of switchtenders, preference shall be given to yardmen disabled in the service of such company, whenever such injuries are not such as to unfit them for such duties. Disabled yardmen desiring to be considered in line for such positions may file application [fol. 170] with the proper officer of the company upon the line where injury was received.

The yardman so disabled or incapacitated will date his seniority as switchtender from the date when permanently disabled or incapacitated in the terminal where employed.

Article XV

Return of Time Slips

(a) When for any reason the time claimed by time slip is not allowed or if the time slips are not made out correctly, they will be promptly returned and the reason given therefor.

Voucher for Omitted Time

(b) Yardmen or switchtenders who are short eight hours or more in their pay will upon request be given a voucher for the amount.

Article XVI

Expense for Notary Fees

When the Company requires that official papers shall be certified by a Notary Public or other court officer, it shall pay ths fee assessed by such officers.

Article XVII

Serving on Committee

Any yardman or switchtender serving on the Committee shall not be discriminated against and shall have leave of absence, upon request, to serve on such committee.

Article XVIII

Cabooses

Yardmen will be furnished cabooses in transfer service, also on other extended runs justifying having cabooses. [fol. 171] A yard crew shall be permitted to switch the

caboose required by this rule to the rear end of the train before commencing a transfer or other extended movement. Cabooses will be equipped with stoves, tools, signal appliances, lamps and such other supplies as are required for the service. Present practice of drawing supplies to continue.

Article XIX

Equipment of Engines in Yard Service

(a) All engines assigned to switching service shall be equipped with headlights, foot boards and proper safety appliances at both ends.

(b) Engines that blow steam, so as to obstruct the observation of signals, shall not be used in yard service.

Article XX

Chaining Cars, Coupling and Uncoupling Hose

(a) Yardmen will not be required to chain up or unchain cars, couple or uncouple hose, in yards or on repair tracks where carmen are employed.

Note:—Under this rule, yardmen will, if necessary to avoid delay, couple air hose between engine and cars.

Handling Cables, Side Boards, Etc.

(b) It will not be the duty of yardmen on work trains to handle cables, side boards, side doors, or to operate weed burners, rail loaders, Lidgerwoods or spreaders.

Article XXI

Charges by Yardmen

(a) When objections or charges are made against any yardman or switchtender by other yardmen or switchtend- [fol. 172] ers they shall be put in writing, and shall convey a full and clear statement of the objections or charges.

Investigations and Hearings

(b) The proper officer of the Company will hear any reasonable complaint made by an individual yardman or switchtender, or any complaint made by the authorized committee

of the B. of R. T. representing same, provided due notice shall be given the Company in writing of the subject of the complaint, and a special appointment made as to the time and place same shall be considered.

(c) Yardmen or switchtenders continued in the service or not censured pending an investigation of an alleged offense shall be notified, within five days after the Company has information of the offense, that a charge is pending. Within five days thereafter an investigation shall be held, if demanded and a decision shall be rendered and made effective within three days after the investigation.

(d) Yardmen or switchtenders taken out of service or censured for cause shall be notified by the Company of the reason therefor, and shall be given a hearing within five days after being taken out of service, if demanded, and if held longer shall be paid for all time so held at their regular rates of pay. Yardmen or switchtenders shall have the right to be present, and to have an employe of their choice, at hearings and investigations to hear all oral and to read all written testimony, and to bring out any facts in connection with the case. They shall also have the right to bring such witnesses as they may desire to give testimony and may appeal to a higher officer of the Company in case the decision is unsatisfactory. Such decision shall be made known in writing within three days after the hearing, or yardman or switchtender will be paid for all time lost after expiration of the three days. If, as a result of discipline administered, any exception is taken thereto by the yard- [fol. 173] man or yardmen, switchtender or switchtenders involved, a transcript of all evidence taken at investigation shall be furnished Chairman of Committee upon request, providing the Chairman presents the Company's office with a written request, from the yard man or switchtender disciplined, for such transcript, and a statement of the yardman's or switchtender's reason and contention for believing that the discipline administered is unjust. In case the suspension, dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost.

(e) Yardmen or switchtenders not at fault, required by the Company to be present at investigations as witnesses, will be paid for all time lost.

Article XXII

Employment—Experienced Men

In the employment of yardmen experienced men shall be given preferred consideration.

Article XXIII

Better Conditions or Allowances

Upon roads having better rules, conditions or allowances for men in yard service, the acceptance of this agreement shall not operate as annulment thereof, nor will it abrogate any privilege heretofore enjoyed by yardmen or switchtenders.

Article XXIV

Adjustment of Controversies on Schedule

Any controversy arising as to the application of the rules herein agreed upon to the schedule of the individual roads, between officers, yardmen and switchtenders, shall be taken up by the local committee and the local officials of the indi- [fol. 174] vidual roads. In the event of failure on their part to agree on a satisfactory basis of settlement the Committee of the Brotherhood of Railroad Trainmen, representing the yardmen and switchtenders, may take up the question with the General Manager, and in the event of their failure to agree upon a satisfactory adjustment, the Committee may appeal to the Managers' Committee that has been conducting these negotiations.

Article XXV

It is agreed that the interpretations on the rules contained herein, as handed down by the Commission of Eight and Director General of Railroads, shall remain in force during the life of this agreement.

Article XXVI

Life of This Agreement

The Rules and Rates of Pay herein agreed upon shall remain in effect until revised or abrogated, of which intention thirty days' notice shall be given by the party desiring the change.

Rates of pay effective January 1, 1919 (as revised by arbitration agreements, Eastern and Western Territory, effective December 1st, 1926, and March 1st, 1927, respectively).

Changes in rules due to Supplement 16 to General Order No. 27 effective April 10, 1919.

All other rules effective January 2, 1920.

Signed at Chicago, Illinois, December 20, 1919. For the Railroads: Signed: A. P. Titus, Chairman; F. L. Johnson, W. S. Cooper, W. F. Schaff, W. H. Scriven, W. J. O'Brien, G. B. Vilas, J. J. Pelley, [fol. 175] G. J. Schreeve. For the B. R. T.: Signed: A. F. Whitney, Vice President, B. R. T.; H. R. Sauer, Chairman, Chicago Association, B. R. T.; H. P. Gallagher, Vice Chairman, Chicago Association, B. R. T.; W. W. McKirchy, Secretary, Chicago Association, B. R. T.

The following Questions and Answers are the result of controversies arising as to the proper and literal intent of Rules contained in Chicago Memorandum of Agreement handed down by the Commission of Eight, Director General of Railroads, and Conference Committee of Managers:

Article I

Rates of Pay

Par. (a)

Where rules of existing schedule agreements provide that switchtenders are paid helpers' rates, such rules will be continued.

Question 112. (Interpretation No. 1 to Supplement No. 16 to General Order No. 27.) Are daily rates mandatory, or may rates be expressed in hours?

Decision. Supplement specifies daily rates.

Article II

Par. (b)

Overtime

Except when changing off where it is the practice to work alternately days and nights for certain periods, work- [fol. 176] ing through two shifts to change off; or where

exercising seniority rights from one assignment to another; or when extra men are required by schedule rules to be used, all time worked in excess of eight hours' continuous service in a twenty-four hour period shall be paid for as overtime, on the minute basis at one and one-half times the hourly rate.

Question 119. Interpretation No. 1 to Supplement No. 16 to General Order 27. What compensation should be allowed for additional service where a crew is regularly assigned to work 12:00 midnight to 8:00 A. M. (service performed not affected by exceptions outlined in this rule):

(a) Is required to cover the third shift on the same day—4:00 P. M. to 12:00 midnight?

(b) Is required in an emergency to work 8:30 A. M. to 11:30 A. M.?

(c) Is required in an emergency to work 8:00 P. M. to 12:00 midnight (4 hours) on the same day?

(d) Is given 48 hours' notice and assignment is moved up an hour, starting at 11:00 P. M. and being relieved at 7:00 A. M. and consequently in the 24-hour period works 9 hours, but not more than 8 hours on a shift?

Decision. (a) Eight hours at time and one-half.
(b) Eight hours at time and one-half.
(c) Eight hours at time and one-half.
(d) On account of complying with the 48-hour provision, which makes it permissible to change beginning time, crews only entitled to a minimum day.

Question 120. (Interpretation No. 1 to Supplement No. 16 to General Order No. 27.) An extra man is worked on two eight-hour shifts within the same 24-hour period, or on one eight-hour shift and is started on another shift in the same 24-hour period that spreads into the next 24-hour period. How shall he be paid for such service?

[fol. 177] Decision. It should be understood that under that portion of Article XIV applying to extra men when required to remain on duty in excess of eight hours in continuous service, they will receive overtime at time and one-half on the minute basis. When they start a second trick within a 24-hour period, they will not be paid under the overtime rule, but will start a new day regardless of present rules, and will receive for eight hours or less

straight time rates. The intent of this is not to deprive extra men of extra work, which would result if time and one-half had to be paid for the second shift.

Question 121. What compensation should be allowed an extra man who is called and at 4:00 A. M. relieves a regular man who is covering an assignment 12:00 midnight to 8:00 A. M. and the assignment works until 9:00 A. M.?

Regular yardman working 4 hours.
Extra yardman working 5 hors.
Remainder of crew working 9 hours.
Decision. Extra man will receive a minimum day only.

Article II

Par. (c).

Assignments

(c) Yardmen shall be assigned for a fixed period of time which shall be for the same hours daily for all regular members of a crew. So far as it is practicable assignments shall be restricted to eight hours' work.

Question 125. (Interpretation No. 1 to Supplement No. 16 to General Order No. 27.) If a yard crew was assigned for 10 hours and for some reason was relieved at the expiration of 8 hours what number of hours is to be allowed?

[fol. 178] Decision. A minimum of eight hours. Assignments should be for eight hours and time worked in excess thereof should be paid for as overtime.

Article III

Paragraphs (b), (c) (d) and (e)

Defining Yard Work

(b) The switching of all freight and passenger equipment operating exclusively within the switching limits;

(c) The transfer of all freight and passenger equipment operating exclusively within the switching limits;

(d) The handling of all construction and maintenance of way trains operating exclusively within the switching limits;

(e) The handling of all work trains and milk trains operating exclusively within the switching limits;

February 8, 1917, Conference Committee of Managers ruled on Case No. 2, C. B. & Q. Railroad—request for Interpretation Article III—as follows:

"That the C. B. & Q. Railroad shall discontinue handling freight trains between Center Avenue and Hawthorne with road crews.

"That the railroads will continue handling freight traffic in trains manned by road crews within the switching limits where such practice was established prior to, and has continued in effect since, April 17, 1913, but that no new locations may be established within the switching limits from which road freight crews may run except by mutual understanding between the individual lines and their properly authorized committee."

[fol. 179]

Article IV

Par. (a)

Pay to Starting Point, Reporting, and Not Used

(a) Pay of yardmen shall continue until they return to the point at which they started work.

Yardmen reporting for duty after being called, and not performing service, will be paid for one day. This will not affect the present practice of requiring extra men to report morning and evening to find if work is available.

March 13, 1911, Conference Committee of Managers ruled on Case No. 1, I. H. B. Railroad—violation of Article IV, paragraph (a):

"On July 29th, Conductor Sargent and crew were ordered to leave Gibson at 3:45 P. M. and were tied up at Chappel at 8:35 on the morning of July 30th, being in service 16 hours and 50 minutes. On the return trip they were ordered to leave Clearing at 6:35 P. M., July 30th, and were released at Gibson at 6:25 A. M., July 31st, being in service 11 hours and 50 minutes. Claim was made for 38 hours and 40 minutes, this being the exact time that the crew was out of Gibson. The crew was allowed 28 hours and 40 minutes, the company deducting the time that they were held at Clearing for rest."

Question 1. Has the Company the right under the rule in question to deduct the time that the men were tied up for rest?

Decision. Under a strict interpretation of Article IV (a), as printed, the Conference Committee of Managers must answer your question in the negative.

Article V

Par. (a)

Lunch Time

(a) Yard crews will be allowed 20 minutes for lunch between 4½ and 6 hours after starting work without deduction in pay.

[fol. 180] Question 13. (Supplement "B", Decision No. 1, Commission of Eight.) Paragraphs (a), (b), (d) and (e). Under the several provisions for meal periods, must they be given within the prescribed time?

Answer. Yes. The lunch period must be given and completed within 4½ and 6 hours.

Article V

Par. (b)

Lunch Time

(b) Yard crews will not be required to work longer than 6 hours without being allowed 20 minutes for lunch, with no deduction in pay or time therefor.

Question 2. (Supplement "A", Decision No. 1, Commission of Eight.) If a yard crew, through some unforeseen circumstances, be on duty say 14 hours, would the crew be entitled to a second period in which to eat, and if so, when would it begin?

Answer. Decision No. 1, Article 2, paragraph (e) applies to both the first and second lunch periods. In the case cited, crew would be entitled to the second lunch period 6 hours after completing the first lunch period. In either case, yardmen will not be worked longer than 6 hours without being given an opportunity to eat.

Article VI

Par. (f)

Starting Time

(f) At points where only one yard crew is regularly employed, they can be started at any time, subject to Section (a).

Question 5: (Supplement "A", Decision No. 1, Commission of Eight.) In a certain switching district, engine terminal is located at A. Engines work out of A, switching all day at B—2 miles from A; at C—3 miles, D—4 miles, E—5 miles. Can B, C, D, and E be considered Isolated Yards?

Answer. Crews working out of a common terminal do not come within the exception relating to Isolated Yards.

[fol. 181]

Article VII

Consist of Crews

A yard crew shall consist of not less than one foreman and two helpers, and yardmen will not be required to work with less than a full crew as specified above.

February 8, 1917, Conference Committee of Managers ruled on Case No. 5—Request for Interpretation of Article 7—as follows:

"It is ruled that the language of this Article is plain and specific, and intends that a yard crew in service shall, at all times, consist of not less than one foreman and two helpers, and that yardmen are, under the provision, language and intent of this rule, justified in declining to perform service with less than the required and stated number of men on the crew, and no charge will be placed against a yardman or against yardmen on account of taking such position."

Article IX

Paragraphs (a) and (b)

Allowance for Attending Courts, Etc.

(a) Yardmen or switchtenders attending court or inquests under instructions from the company will be allowed the same compensation they would have earned had they re-

mained on their regular assignment, plus actual expenses. Extra men so used will be allowed a minimum day, plus actual expenses. Money so earned shall be paid not later than the next regular pay day.

Attending Investigations

(b) Yardmen or switchtenders required by the company to be present as witnesses at investigations, other than those covered by Article XXI, will be paid for all time lost plus expenses.

December 18, 1919, Conference Committee of Managers agreed to the following interpretation:

[fol. 182] To the Railroads "Chicago, December 18, 1919.
Members of the Chicago Switching Agreement, B. of R. T.

The Conference Committee of Managers has agreed with Mr. A. F. Whitney, Vice-President of the Brotherhood of Railroad Trainmen, effective this date, to apply the following interpretation on Sections A and B of Article 9, and section E of Article 21 of the Chicago Memorandum of Agreement:

"Yardmen required to report during layover time to give information at inquests or investigations, where they are not at fault, will be paid for time so held, with a minimum of two hours, at regular rates and expenses, this time to commence on arrival at place where investigation is to be held and continue until released.

"Should the yardmen be detained so as to be unable to get ten hours' rest and assume his regular duties he shall be paid for one day, which shall cover his duty time and time lost on assignment.

"It is understood that this interpretation shall only remain in force during the life of the present schedule and is without prejudice to either party in future negotiations.

(Signed) A. P. Titus, Chairman.

Copy to the Members Conference Committee of Managers."

Article XII

Par. (a)

Employment

(a) Applications of yardmen and switchtenders for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted.

October 6, 1913, Conference Committee of Managers ruled—

"Chicago, October 6th, 1913.

[fol. 188] Ruling of the Managers' Conference Committee on Question Presented by the Brotherhood of Railroad Trainmen, on Schedule Effective April 16, 1913

1. Disagreement between the C. B. & Q. Railroad Company and its yardmen respecting application of Article 12 (a), reading:

"Applications of yardmen for employment, if not satisfactory, will be rejected within thirty days after first service, or applicant will be considered accepted."

Specific Case: On December 24th, 1912, the Company employed a yardman by the name of C. J. Flaherty, to work in its Chicago yards; his service began on date employed and continued until June 2nd, 1913, when he was discharged account employment department refusing to pass his application.

Company contends that as Flaherty was employed before the current agreement was consummated, it was not bound by its terms in his case.

The Committee contends that the agreement in question became effective April 16th, 1913, and did govern the employment of Flaherty, as his application had not been approved at that time, and that its failure to reject said application within thirty days thereafter was tantamount to accepting it.

Ruling: "Article 12 (a) Governs the Application of Yardmen Beginning Service Prior to April 16th, 1913, and Such Applications Should Be Accepted or Rejected Before the Expiration of Thirty (30) Days from the Date the Schedule Became Effective."

Article XX

Par. (a)

Chaining Cars, Coupling and Uncoupling Hose

(a) Yardmen will not be required to chain up or unchain cars, couple or uncouple hose, in yards or on repair tracks where carmen are employed.

[fols. 184-186] Note:—Under this rule, yardmen will, if necessary to avoid delay, couple air hose between engine and cars.

February 8, 1917, Conference Committee of Managers ruled on Case No. 4—Request for interpretation of intent of last sentence of Article XX—as follows:

"The last sentence of Article 20 of the Chicago Switching Agreement states:

"This rule will not apply to coupling or uncoupling between the engine and cars."

The Managers' Conference Committee *are* heartily in accord with all safety principles, and concede that a yardman is entitled at all times, insofar as is consistent and possible, to be sure that as a result of the performance of his duties he is not entailing any unnecessary risk or danger to life or limb.

The Managers' Conference Committee rules:

That a yardman has the right to keep in mind and be governed by safety rules, when such rules are in effect on his line, and is within his rights in insisting on the full observance of such safety rules.

Article XXI

Par. (e)

Investigations and Hearings

(e) Yardmen or switchtenders not at fault, required by the Company to be present at investigations as witnesses, will be paid for all time lost.

Refer to agreement on paragraphs (a) and (b) of Article IX, under date of December 18, 1919.

H. P. Gallagher, Chairman; W. W. McKirchy, H. R. Sauer, B. L. Frederick, Sub-Committee of Chicago Association B. of R. T.

[fol. 187] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY WITH RESPECT TO MOTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN TO INTERVENE AS DEFENDANTS IN THE ABOVE ENTITLED CAUSE—May 29, 1946

The Chicago River and Indiana Railroad Company and The New York Central Railroad Company do not oppose the motion of the Brotherhood of Railroad Trainmen to intervene in this case. They have, since the first proceedings were had in open court (February 21, 1946) with respect to this case, informed the court that these defendants consider such of their employees, as might be affected by the relief prayed in the complaint, necessary parties to this litigation. But these defendants object to certain untrue and misleading statements of fact and incorrect conclusions of law contained in the motion of the Brotherhood of Railroad Trainmen. These statements and conclusions are expressly excluded from the affidavit attached to the motion but are nevertheless of such a character that we should be remiss in our duty to court and counsel were we to permit them to go unchallenged.

These defendants deny that they are under any obligation, legal or otherwise, to represent in this suit the interests of the Brotherhood of Railroad Trainmen, particularly with [fol. 188] respect to any issues as to which the interests of said Brotherhood may conflict with the interests of these defendants. They deny that they have at any time or in any manner sought to lead their employees, or any of their employees' representatives to believe that these defendants would furnish counsel for such employees or that the attorneys for these defendants would represent the Brotherhood of Railroad Trainmen in this suit or follow directions or suggestions given by the attorneys for the Brotherhood of Railroad Trainmen.

These defendants promptly informed the Brotherhood of Railroad Trainmen of the filing of this suit on February 18, 1946. They sent to the Brotherhood of Railroad Trainmen on March 14, 1946, a certified copy of a temporary injunction entered that day by this court. When counsel for the

Brotherhood of Railroad Trainmen on March 18, 1946, in open court requested leave to appear specially, counsel for these defendants objected to such special appearance but suggested that the Brotherhood of Railroad Trainmen appear generally and informed the court that these defendants had no objection to such general appearance.

This court told counsel for the Brotherhood of Railroad Trainmen on March 18, 1946, in connection with their application to appear specially, that if they wanted to file a general appearance in this case they might do so, but it was not until two months later by its notice of motion to appear in court on May 20, 1946, that the Brotherhood of Railroad Trainmen sought to intervene by general appearance.

These defendants deny that under the terms of the agreement described in paragraph 1 of the motion the employees in question are entitled to all work performed by trainmen on the lines of the Chicago River and Indiana Railroad Company.

These defendants deny the innuendo and allegations in [fol. 189] paragraphs 2 and 3 of the motion to the effect that these defendants violated their agreement concerning rates of pay, rules and working conditions.

These defendants deny that the written settlement made on January 23, 1946, was a "settlement interpretation" or a written interpretation of provisions of any previously existing agreement as alleged in paragraphs 3 and 4 of the motion. They object to the improper criticism of this court contained in the last sentence of paragraph 3.

These defendants deny that this suit involves and grew out of a labor dispute and question Brotherhood of Railroad Trainmen counsel's construction of 49 U. S. C. 17 (11).

These defendants deny that they owed any duty to the Brotherhood of Railroad Trainmen to oppose the intervention of the Interstate Commerce Commission as a party plaintiff and on the contrary assert that opposition to such intervention would have been improper.

These defendants admit that their answer was not filed until May 6, 1946, but aver that the filing of such answer at that date could in no respect prejudice the rights of Brotherhood of Railroad Trainmen, and, moreover, a stipulation of facts had previously been filed on February 25, 1946, before the request for a preliminary injunction was considered by this court.

These defendants deny that said stipulation of facts was inadequate or that it omitted any facts necessary to advise the court of the issues then properly before it.

Counsel for these defendants considered the authorities mentioned in paragraph 14 (2) (e), (f) but were not persuaded that they were applicable or decisive of any issues involved in this suit and therefore omitted the same from their brief. The section mentioned in sub-paragraph 2(g) of paragraph 14 was cited in the brief of these defendants (p. 11).

[fols. 190-191] Counsel for these defendants did not inform Brotherhood of Railroad Trainmen counsel that these defendants would file a petition to make the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, or any of them, parties defendant to this suit and have not, in any respect, violated any agreements made with the Brotherhood of Railroad Trainmen or its counsel. The Brotherhood of Railroad Trainmen counsel have no basis for any claim that they were mislead by counsel for these defendants nor any basis for blaming their delay in seeking to intervene herein upon the conduct of these defendants.

Respectfully submitted; Sidney C. Murray, Marvin A. Jersild, Attorneys for The Chicago River and Indiana Railroad Company and The New York Central Railroad Company.

May 29, 1946.

Sidney C. Murray, Marvin A. Jersild, 1236 LaSalle Station, Chicago 5, Illinois. Wab. 4200.

Received a copy of the above Statement this 29th day of May, 1946.

E. S. Ballard, W. F. Price, Pope & Ballard, Attorneys for Plaintiffs. Robert McCormick Adams, Burke Williamson, and Adams, Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen. Ralph M. Shaw, Guy A. Gladson, Bryce L. Hamilton, Winston, Strawn & Shaw, Attorneys for Chicago Junction Railway Company, Defendant.

Gertrude Adam, being duly sworn, says that she served the above Statement upon H. L. Underwood, Attorney for

the Interstate Commerce Commission, Intervening Plaintiff, by depositing a copy in the United States mail, post paid, addressed to him at 3341 I. C. C. Building, Washington, D. C., on the 29th day of May, 1946.

Gertrude Adam.

Subscribed and sworn to before me this 29th day of May, 1946. L. E. Matthews, Notary Public.

[fol. 192] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Transcript of Proceedings—Filed June 14, 1946

[fol. 193] Transcript of proceedings had in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, in his court room, United States Court House, Chicago, Illinois, on Monday, May 20, 1946.

Present: Mr. Ernest S. Ballard, Mr. H. L. Underwood, Mr. Sidney C. Murray, Mr. Victor Lewis, Mr. Guy Gladson, Mr. Robert McCormick Adams, Mr. Burke Williamson.

[fol. 194] By the Clerk: No. 46 C 275, Baltimore and Ohio Railroad Company et al., against The Chicago River and Indiana Railroad Company, et al. Motion for leave to intervene as defendant and file motion of the Brotherhood of Railroad Trainmen to vacate preliminary injunction, to assess damages against the plaintiffs, and for summary judgment.

Mr. Williamson: If your Honor please, sometime ago I made this same motion by way of a special appearance. I now move, your Honor, for leave to the Brotherhood of Railroad Trainmen to intervene as a party defendant, and will suggest that if that leave is granted we file instanter with your Honor's permission the motion to vacate the preliminary injunction, set it down for hearing.

Mr. Ballard: Plaintiffs are opposed to the motion, if your Honor please, the motion to intervene. A brief has been filed, which was served on us last week, and we would like to have an opportunity to reply to it.

Mr. Williamson: No objection on my part, your Honor.

The Court: What is the necessity for intervention, and what is the interest of the party?

Mr. Williamson: If your Honor please, the motion sets forth, the motion for leave to intervene sets forth that we are entitled to intervene on two separate grounds: First, [fol. 195] because we are indispensable parties and as part of being indispensable parties, we must be here before any action can be taken against us.

The Court: Would any action taken in any event be void?

Mr. Williamson: That was your position when we were here before, and your Honor suggested if we came in on a general appearance that would be satisfactory. That is what we are here to do now, your Honor.

You remember my other motion——

The Court: Either you are or are not indispensable parties. I don't know which position you are taking.

Mr. Williamson: Yes. In addition to the point of being indispensable parties, Rule 24 (a) of the Rules of Civil Procedure gives the right of intervention.

First, your Honor, under a federal statute we have an unconditional right to intervene.

The Court: If you have an unconditional right to intervene, then why don't you file your papers——

Mr. Williamson: I have done that.

The Court: That does not leave anything for me to pass on, does it?

Mr. Williamson: Unless counsel objects, I think there is not.

Mr. Ballard: We object.

[fol. 196] The Court: Suppose they do object. If you have an unconditional right to intervene, you don't have to get an order of court.

Mr. Underwood: On behalf of the Commission, I do not believe the statute they refer to gives them an unconditional right. I think what they are predicating their unconditional right on here is the statute which says they may intervene in the Commission proceedings.

Mr. Williamson: The statute does not say that. It says the representatives of the employees, which is the Brotherhood of Railroad Trainmen, have an unconditional right to intervene because of the fact that they are necessary parties to the proceeding out of which this suit arises.

Under the Interstate Commerce Act, Section 17 (11)—suppose I just read that section to your Honor.

The Court: Yes, I would be glad to hear it.

Mr. Williamson: Title 49, U. S. C. A., Section 17 (11):

> "Representatives of employees of a carrier duly designated as such may intervene and be heard in any proceeding arising under this chapter and Chapters 8 and 12 of this title, affecting such employees."

If your Honor please, the chapter referred to is the Interstate Commerce Act, Section 1, or part 1. The entire [fol. 197] suit is based on that chapter. It involved, if your Honor will recall, an order issued by the Commission. This is certainly, your Honor, a proceeding arsiing under that chapter.

The Court: Is this an enforcement of an order entered by the Commission or is it an effort to invalidate such an order?

Mr. Williamson: The order is for the enforcement, the proceeding is for the enforcement of an order of the Commission.

The Court: Then I must have understood this backwards. I understood this as a situation where the alleged effect of some alternate parties' contract would be to avoid the order of the Commission.

Mr. Ballard: That is true, what counsel says about it being a proceeding for enforcement. We recognize that. But if your Honor will look at the context in which subparagraph 11 appears, you will find it relates entirely to administrative proceedings before the Commission. It is impossible to read that section as giving a right to intervene here except by tearing it from its context.

Also there is the question which would go to the matter of right, as to whether this proceeding affects such em- [fol. 198] ployees. That is a complicated question.

The Court: If it affects them, why didn't you make them parties?

Mr. Ballard: We do not think it affects them in the slightest.

Mr. Williamson: All we know is that we were enjoined from working; so I suppose we must be affected.

The Court: What do you mean?

Mr. Williamson: Your Honor issued an injunction order on March 14th, commanding the employees of the three defendant roads to permit employees of plaintiffs to do the

work which we claim the employees of the defendants are entitled to do.

The Court: Just a minute.

Mr. Williamson: So we certainly are affected.

The Court: How did that order read?

Mr. Williamson: It commanded the employees of the three defendant railroads to permit the plaintiffs' employees to come on the lines of the defendant railroads and perform certain switching work. They have been enjoined, your Honor, since March 14th.

The Court: Where is that order? It sounds very peculiar.

Mr. Williamson: Have you a copy of the preliminary injunction order?

[fol. 199] Mr. Ballard: That is correct, your Honor. It is simply for the reason that in enjoining the railroad it is necessary to enjoin its agents. If you do not enjoin the individuals the order miscarries and it is not enforceable in the sense of the statute under which the complaint is filed here requires the injunction run not only against the corporate defendant but against its agents, representatives, et cetera.

The Court: That is the only way you can ever enjoin a corporation.

Mr. Williamson: In view of counsel's position, I think I should call your attention to 123 F. (2d) 326, which I did not cite in the brief I filed because I did not know counsel would take that position.

That says specifically if the employees of a railroad, or employees in this case of a motor carrier, have a contract with their employer which is involved in an injunction of the type we have here, then those employees are indispensable parties.

And the mere fact, your Honor they are agents of the railroad does not make the ordinary rule with respect to injunction apply. I think undoubtedly Mr. Ballard is correct when he says ordinarily a corporation can act only through its agents.

The Court: You cannot enjoin a corporation any other [fol. 200] way that I know of.

Mr. Williamson: But this case says when the claim is made by the employees that they have a contract right with the corporation being enjoined, then the ordinary rule does not apply, and clearly those employees are indispensable parties to the proceeding.

The Court: It has been several weeks since you gentlemen were in here, and a lot of water has gone over the dam since then; but it is my recollection that I held, or intended to hold, that a contract between private parties could not avoid or evade or invalidate an order of the Interstate Commerce Commission. That was the extent of my holding, or my intended holding. I don't know whether I went further than that or not.

Mr. Williamson: Yes, your Honor did.

The Court: I do not have any present recollection.

Mr. Ballard: I do not think your Honor went any further than that.

The Court: That is as far as I intended to go, and to that position I shall adhere.

Mr. Williamson: We should be permitted to intervene, to raise these points.

The Court: If you have a right to intervene, I want some briefs on it.

Mr. Williamson: I have already filed a brief under Rule [fol. 201] 7, and it was delivered to your Honor five days after service of notice. I think under that same rule counsel for the respondent would have ten days, and I would have five days thereafter.

The Court: That is perfectly all right, but I want some briefs on it. Ordinarily intervention is not permitted unless there is some definite reason for it.

Mr. Ballard: I think we should go to a full hearing on it at any time convenient to your Honor.

The Court: If you are indispensable parties any order the court might make would be void in any event. You don't need to give the matter a second thought. If you want to come in in the position of an amicus curiae——

Mr. Williamson: No. We suggested once before, on special appearance that might be done, but your Honor did not like that.

The Court: No.

Mr. Williamson: We are following your suggestion of a general appearance.

The Court: You are in on general appearance and you filed a motion for leave to intervene?

Mr. Williamson: That has been done.

The Court: Briefs have been filed and they are due on the other side?

Mr. Williamson: Yes.

[fol. 202] Mr. Ballard: May we have until a week from today to file our brief?

The Court: I think that is reasonable. You should be entitled to more than that if you want it.

Mr. Williamson: The only reason for any hurry at all is that the employees have, since March 18th, been enjoined from doing the work they claim they are entitled to, and they are losing about $200 a day.

The Court: They are all going on a strike anyway, so that they won't lose anything.

Mr. Williamson: The bond is only $10,000, which is another reason for hurrying the matter along, I think. The bond will be used up as far as the employees' claims are concerned within a week.

The Court: The employees are not parties to the suit.

Mr. Williamson: They are using the preliminary injunction as a reason for refusing to pay time claims.

The Court: The parties are solvent.

Mr. Underwood: I want to say, on behalf of the Commission, that it takes a neutral position with respect to the intervention, but I call your Honor's attention to the statutory authority relied on, so that it might clear up that point, that it was only a proceeding before the Commission. In making the statement as to our position I do not [fol. 203] want to be understood as admitting or conceding anything contained, a number of things contained in the petition for intervention, for instance, the attitude of the Commission or the right of the Commission, or anything of that sort. I am not conceding that and, as a matter of fact, I think we have a right and we are here solely in the interests of the public in enforcing our own order.

The Court: I took the position and I intend to adhere to the position, that an order of the Commerce Commission cannot be avoided by private contracts between any individuals or groups of individuals or railroad companies, or anybody else. If there is relief wanted from such an order of the Commission it must be obtained in the statutory manner and through the regular channels. That is the holding I made and that I will keep on making.

I do not know what you will file in the way of briefs, but you may as well know it now.

Mr. Ballard: May I suggest May 29th for plaintiffs' brief?

The Court: That is good. That is the day before Decoration Day.

Mr. Williamson: And about five days is all we will need.

The Court: That will be June 5th.

Mr. Williamson: Will your Honor then set it for hear-[fol. 203a] ing now?

The Court: I have to see the briefs first.

Mr. Williamson: May we have oral argument on it before any decision is made? Would that be convenient to your Honor?

The Court: I will look at your briefs first, before I decide that question. You know the frame of mind the Court is in in regard to this matter. If you are prepared——

Mr. Williamson: That is why I should like oral arguments. That is why I think oral arguments would be very helpful, from my standpoint.

The Court: It seems obvious that private parties cannot change an order of the Commission. There are means of reviewing orders of the Commission. If private parties can get together and set aside such an order, you might as well repeal the Interstate Commerce Act in its entirety.

Mr. Underwood: You have stated our position exactly.

The Court: It seems elementary.

Mr. Williamson: The provisions of the Norris-LaGuardia Act take effect even though there has been an order of Commission.

The Court: Did that modify or repeal the Interstate Commerce Act in any of its sections?

[fol. 204] Mr. Williamson: I will say that did.

The Court: Did that say so or are you seeking to argue that by implication?

Mr. Williamson: They refused to enforce the Motor Carrier Act, which is part of the Interstate Commerce Act, and they would not enforce it because of the provisions of the Norris-LaGuardia Act.

The Court: I made my ruling on the preliminary injunction, and I will consider your briefs with great care.

Mr. Underwood: Will you want any from me?

The Court: That is up to you. I don't ever want briefs. If the parties want to file briefs, go ahead.

Mr. Underwood: If I can be of help to the Court——

The Court: I hope you can be.

Mr. Adams: We would like to be heard orally. It is of supreme importance——

The Court: If it is a matter of supreme importance, the quicker you get to the higher court the better off you will be.

Mr. Adams: But we would like a chance to elucidate our reasons.

The Court: Very well.

By the Clerk: In the same case, motion for leave to file instanter answer of the Chicago River and Indiana Rail-
[fol. 205] road Company and the New York Central Railroad Company to complaint of intervention of the Interstate Commerce Commission.

The Court: They have a right to file an answer automatically. You don't need a motion on that.

Mr. Murray: We did not have a rule on us to file an answer.

The Court: Do you have to have a rule to answer?

Mr. Murray: I thought you did.

The Court: Either you have a right to answer, or you haven't. I never heard of anybody being barred from a right to answer yet.

Mr. Murray: All right, Sir.

(Which were all the proceedings had in the above-entitled cause on Monday, May 20, 1946.)

[fols. 206-207] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 208-209] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN—November 7, 1946

This cause having been heretofore taken under advisement on the motion of the Brotherhood of Railroad Trainmen for leave to intervene herein and the Court having considered the briefs of counsel and being fully advised in the premises

It Is Ordered that said motion for leave to intervene be and it is hereby overruled and denied.

[fols. 210-211] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTIONS OF BROTHERHOOD OF RAILROAD TRAINMEN—November 26, 1946

The Court being fully advised in the premises

It Is Ordered that the motion of the Brotherhood of Railroad Trainmen to amend its motion to intervene herein and the motion to vacate the order denying leave to said Brotherhood to intervene be and they are hereby denied.

[fol. 212] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF BROTHERHOOD OF RAILROAD TRAINMEN TO AMEND ITS MOTION TO INTERVENE AS DEFENDANT AND MOTION TO VACATE ORDER DENYING BROTHERHOOD OF RAILROAD TRAINMEN LEAVE TO INTERVENE—November 26, 1946

To the Honorable Elwyn R. Shaw, Judge of said Court:

Now comes the Brotherhood of Railroad Trainmen, an unincorporated association, hereinafter sometimes referred to as the Brotherhood, and alleges:

1. The Motion of Brotherhood of Railroad Trainmen to Intervene as Defendant was presented to this Court on May 20, 1946. Attached to said Motion was a pleading which set forth the claim or defense for which intervention was sought, which pleading was entitled Motion of Brotherhood of Railroad Trainmen to Vacate Preliminary Injunction, to Assess Damages Against Plaintiffs, and for Summary Judgment.

2. The Brotherhood's said motion to intervene was held under advisement by the Court until November 7, 1946, at which time an order was entered denying the motion of the Brotherhood for leave to intervene.

[fol. 213] 3. Section 45a of Title 28 (Judicial Code and Judiciary) of U. S. C. A. is in part as follows:

"The Attorney General shall have charge and control of the interests of the Government in the cases

specified in section 44 of this title . . . in the district courts, and in the Supreme Court of the United States upon appeal from the district courts . . . Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof;"

4. Section 44 of Title 28 (Judicial Code and Judiciary) of U. S. C. A., to which reference was made in the above-quoted portions of Section 45a, is in part as follows:

"The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title . . . ."

5. Section 48 of Title 28 (Judicial Code and Judiciary) of U. S. C. A. is in part as follows:

"All cases and proceedings brought under subdivisions 27 . . . of section 41 of this title . . . shall be brought by or against the United States, and the United States may intervene in any case or proceedings whenever, though it has not been made a party, public interests are involved."

6. Subdivision 27 of Section 41 (Judicial Code and Judiciary) of U. S. C. A. grants jurisdiction to the Districts Courts "Of all cases for the enforcement of any order of the Interstate Commerce Commission."

7. The above Sections have not heretofore been brought to the Court's attention in the pleadings and briefs filed herein with respect to the motion of the Brotherhood to intervene.

[fol. 214] 8. The Brotherhood moves for leave to amend instanter so much of paragraph 14 (1) of the Motion of

Brotherhood of Railroad Trainmen to Intervene as Defendant, which appears on page 6 of said document, as reads:

> "14. The Brotherhood has a right to intervene because it is an indispensable party herein and it also has a right to intervene under Rule 24(a) of the Rules of Civil Procedure for District Courts of the United States, as follows:
>
> "(1) A statute of the United States confers on it an unconditional right to intervene (49 U. S. C. A. 17 (11));"

by adding thereto the following designation of statute:

"(28 U. S. C. A. 45a)."

9. The Brotherhood moves for leave to amend instanter the Motion of Brotherhood of Railroad Trainmen to Vacate Preliminary Injunction, to Assess Damages Against Plaintiffs, and for Summary Judgment, which motion is attached to the Brotherhood's motion to intervene, by adding thereto subparagraph (c) in paragraph 1, on page 4 thereof, immediately following the conclusion of subparagraph (b) of paragraph 1, as follows:

> "(c) For failure to comply with the provisions of 28 U. S. C. A. 48."

10. In view of the above statutory provisions, the Brotherhood moves to vacate the order of November 7, 1946 denying the Brotherhood leave to intervene and asks for the [fols. 215-216] entry of an order granting the relief prayed for by the Brotherhood in Motion of Brotherhood of Railroad Trainmen to Intervene as Defendant.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

Dated: November 21, 1946.

[fol. 217] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Transcript of Proceedings—Filed December 9, 1946

[fol. 218] Transcript of proceedings had at the hearing of the above-entitled cause before the Honorable Elwyn R. Shaw, one of the judges of said court, on November 26, 1946.

Present: Mr. Ernest S. Ballard, Mr. Burke Williamson. Other counsel were also present.

[fol. 219] By the Clerk: No. 46 C 275. Baltimore & Ohio Railroad Company, et al., vs. The Chicago River & Indiana Railroad Company, et al. Motion of Brotherhood of Railroad Trainmen to amend motion to intervene, and motion to vacate order denying Brotherhood leave to intervene.

Mr. Williamson: Your Honor recalls on November 7th the Court entered an order denying motion of the Brotherhood of Railroad Trainmen for leave to intervene. Your Honor, since that order was entered by your Honor, we have made an examination of the law and have, I think, your Honor, discovered two sections which have not previously been called to your Honor's attention in connection with a hearing on the motion for leave to intervene. I regret that these matters have not earlier been called to your Honor's attention, but I think as soon as they have been discovered by any party it is the duty of counsel to bring them in.

Your Honor, Section 45a of Title 28 of the Judicial Code and Judiciary of the United States Code Annotated, provides:

> "The Attorney General shall have charge and control of the interests of the government in the cases specified in Section 44 of this title * * * in the district courts,—"

[fol. 220] The Court: What title is this you are talking about?

Mr. Williamson: I am talking about the Judicial Code, Title 28.

The Court: All right.

Mr. Williamson: (Reading:)

"and in the Supreme Court of the United States upon appeal from the district courts. * * * Provided, further, that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; * * *"

Your Honor, Section 44 of Title 28, the Judicial Code, states in part:

"The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in Section 45, 45a, 47a and 48 of this Title * * *."

[fol. 221] Your Honor, it is clear to me that construing those two sections together gives the Brotherhood of Railroad Trainmen, the representative of the employees who have a pecuniary interest in this proceeding, a statutory right of intervention.

I wish to call this to your Honor's attention now and I ask leave to amend the original motion of the Brotherhood to include reference to Section 45 of Title 28 along with the other statutory right of intervention.

Your Honor will recall that the Brotherhood sought leave to intervene as a matter of right, first, because it said it was an indispensable party and, second, because it said that it had an unconditional right to intervene under a statute of the United States, and your Honor will recall that statute was 49 USCA 17(11). I would like to add, your Honor, Title 28 USCA, 45a to the designation of statutory provisions with respect to intervention by the Brotherhood of Railroad Trainmen.

Your Honor, one other matter of procedure has come to our attention. Title 28 USCA, Section 48, provides:

"All cases and proceedings brought under subdivisions 27 and 28 of Section 41 of this title, and Sections

20 and 43 of Title 49 shall be brought by or against [fol. 222] the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved."

Now, your Honor, subdivision 27 of Section 41, to which reference was made, grants jurisdiction to the district courts of all cases for the enforcement of any order of the Interstate Commerce Commission.

Your Honor, it would seem from that section that the Attorney General should have been in charge of the interests of the United States, and not the Interstate Commerce Commission. That, your Honor, has no bearing——

The Court: Then you are not in position to urge it, unless you are permitted to intervene.

Mr. Williamson: That is correct. The reason for that is this: You will recall the rules require any party seeking leave to intervene must attach to his petition for intervention a copy of the pleading which he proposes to file. The Brotherhood attached such a pleading. The amendment concerning this procedural question of whether the Attorney General should have been brought in would simply go as an amendment to the pleading which we attached to our motion to intervene.

I ask leave to the Brotherhood to make those two amend- [fol. 223] ments to the motion for leave to intervene and, after those amendments, I again ask the Brotherhood of Railroad Trainmen be granted leave to intervene herein.

May I make the one suggestion, I have not complied with Rule 7 of the District Court with respect to filing of briefs, and I would suggest, if it meets with your Honor's approval, and counsel have no other ideas, that briefs be waived with respect to this contested motion.

Mr. Ballard: If the Court pleas——

The Court: I do not think you have said anything, Counsel, I have not already considered and passed upon.

Mr. Williamson: Your Honor has not had this matter called to his attention.

The Court: I have a law clerk I have put some labor on, once in awhile, and I think he covered this case pretty well. I think we discussed the matters in chambers that you have mentioned. The right of intervention, if there is any such thing as an absolute right of intervention, would have to

come under the Commerce Act, and it does not come there. The matters you have referred to, in my judgment, refer to proceedings before the Commerce Commission where some order of the Commission tries to affect those rights of outside parties, such as a labor union or a city or a [fol. 224] village or some other group of individuals. In my judgment it does not apply to cases in court.

Mr. Williamson: If you will let me interrupt long enough to read this again, it says "proceedings before the Interstate Commerce Commission or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission."

The Court: This is not a suit brought under those sections.

Mr. Williamson: It was brought under the Interstate Commerce Act, Section 16(11).

The Court: Have you anything more to add to what you said in your briefs?

Mr. Ballard: Very, very little. If your Honor please, I think in the first place there are technical objections to the motion for leave.

This motion is for leave to amend a motion that has been denied, and there is nothing before the Court that can be amended. Counsel has mistaken his remedy.

In the second place, it seems to us that the laches of which the Brotherhood has been guilty are inexcusable. This matter has been before the Court in one form or another since the 18th of March, when counsel asked to file a brief as a friend of the court, and your Honor denied it, and [fol. 225] said: "If you will file a motion to intervene, I will take it under advisement," and they spent two months preparing their motion to intervene, and your Honor had it under advisement from May until November. Now, after it is disposed of, they come in and ask leave to amend it.

With respect to the merits, I think your Honor has said all that is necessary to say. Even if the section of the Code which counsel now cites is applicable, which we deny, it requires that they show an interest. The question of whether they had an interest or not was involved in their first motion and was disposed of by your Honor's ruling denying that motion. So our position is that both

the motion—well, put it this way: That the motion for leave to amend should be denied. If you should grant the motion for leave to amend, then the amended motion should be denied on the ground it has been disposed of by the ruling on the original motion, because no new right has been shown.

Mr. Williamson: I would simply like to be heard on the question of laches. Your Honor will recall we came in here immediately after the issuance of the injunction by your Honor against the employees, and sought leave as——

The Court: Did I issue an injunction against the employees?

[fol. 226] Mr. Williamson: Yes, sir, you did. It is still standing.

The Court: I don't think so.

Mr. Williamson: That is what your Honor did on March 15th.

The Court: What was that injunction?

Mr. Ballard: It runs against the servants, agents, et cetera, of the Chicago River & Indiana.

Mr. Williamson: And it specifically says employees, your Honor.

The Court: Now, just a minute. That isn't that broad and it is not intended to be that broad and it was not written that way. It is the usual form of injunction. What you did was come in trying to upset an order of the Commerce Commission by an indirect attack, and that is what I enjoined everybody against doing. That is all I did do. That is the way the matter stands and that is the way it will keep on standing until somebody does something about it.

Your motion will be denied.

Mr. Williamson: We had two motions: For leave to intervene——

The Court: That motion is denied, and the motion for leave to amend is denied.

Mr. Williamson: Your Honor, may the Clerk stamp the motion?

[fol. 227] The Court: He may mark it presented, if you wish.

Mr. Williamson: Whichever is better. If we file the motion and you deny it, that is all in the record.

The Court: He may mark it presented; but leave to file it is denied. That saves your record.

[fols. 228-229] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 230] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION OF BROTHERHOOD OF RAILROAD TRAINMEN FOR APPEAL TO SUPREME COURT OF THE UNITED STATES FROM ORDER DENYING LEAVE TO INTERVENE—Filed January 6, 1947

To the Honorable Elwyn R. Shaw, Judge of Said Court, or to Any Other Judge of Said Court:

Now comes petitioner, the Brotherhood of Railroad Trainmen, an unincorporated association, and respectfully shows:

1. Petitioner is acting herein in a representative capacity for employees as trainmen of the defendant The Chicago River and Indiana Railroad Company.

2. On May 20, 1946 petitioner presented to this Court its written motion to intervene as a defendant herein, and represented by said motion that it was entitled to intervene as of right because it is an indispensable party herein and because its unconditional right to intervene is provided by United States statute.

3. On November 7, 1946 an order was entered by this Court denying said motion to intervene.

4. On November 26, 1946 petitioner presented herein its written motion to amend said motion to intervene and to vacate said order denying intervention, both of which motions made on November 26, 1946 were denied, and said [fols. 231-232] order of November 7, 1946 has remained and is in full force and effect, and is in all respects a final order.

5. Petitioner is aggrieved by said order of November 7, 1946, and wishes to appeal therefrom to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith.

Wherefore, petitioner prays that an appeal to the Supreme Court of the United States be allowed from said order of November 7, 1946; that a citation — issued herein; and that a transcript of the record, proceedings, and papers on which said order was based be made and duly authenticated and sent to the Supreme Court of the United States. Petitioner further prays for an order fixing the amount of its appeal bond herein.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

Dated: January 4, 1947.

[fol. 233] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 6, 1947

The Brotherhood of Railroad Trainmen, an unincorporated association, applicant to intervene in the above-entitled cause, files the following assignment of errors upon which it will rely in the prosecution of an appeal petitioned for by it in said cause from the order of this Court entered on the 7th day of November, 1946, denying the motion of the Brotherhood of Railroad Trainmen to intervene herein:

1. The District Court erred by its order entered herein on November 7, 1946 denying the motion of the Brotherhood of Railroad Trainmen, as representative of employees as trainmen of the defendant The Chicago River and Indiana Railroad Company, to intervene in this suit in that said employees had and have a contract right to perform certain work for said defendant railroad, which work this suit seeks to enjoin said employees from performing, wherefore said employees, or their representatives, are indispensable parties in this suit, and, as such, have an absolute right to intervene herein.

2. The District Court erred by said order denying the said motion to intervene in that an unconditional right to [fol. 234-243] intervene is conferred on the Brotherhood of

Railroad Trainmen as representative of said employees as trainmen by Federal statute, to-wit: 28 USCA 45a; 49 USCA 17 (11).

3. The District Court erred by said order denying the said motion to intervene in that the representation of the interest of said employees as trainmen by other parties herein is inadequate within the meaning of Rule 24(a) of the Rules of Civil Procedure of District Courts of the United States and said employees as trainmen are expressly bound by the preliminary injunction issued herein from performing the said work to which they are entitled by contract as aforesaid, and are or may be bound by a judgment in the suit within the meaning of said Rule.

Wherefore, for which errors the Brotherhood of Railroad Trainmen prays that said order entered November 7, 1946 by the District Court denying the motion of said Brotherhood to intervene be reversed, and prays for such other and further relief as to the Court may seem just and proper.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, Attorneys for Brotherhood of Railroad Trainmen, 39 South LaSalle Street, Chicago 3, Illinois. Franklin 2411.

Dated: January 4, 1947.

[fol. 244] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF THE UNITED STATES—January 6, 1947

The Brotherhood of Railroad Trainmen having this day filed and presented herein its petition to appeal to the Supreme Court of the United States from the order entered by this Court on November 7, 1946 denying the motion of said Brotherhood of Railroad Trainmen to intervene as a defendant herein, and this Court having considered said petition to appeal, together with the assignment of errors and the jurisdictional statement filed and presented herein accompanying said petition;

It Is Ordered that the appeal of the Brotherhood of Railroad Trainmen to the Supreme Court of the United States from the order entered by this Court on November 7, 1946 denying the motion of said Brotherhood of Railroad Trainmen to intervene as a defendant herein be and it is hereby allowed; that a citation issue herein; and that a transcript of the record, proceedings and papers on which said order was based be made and duly authenticated and sent to the Supreme Court of the United States.

[fols. 245-246] It Is Further Ordered that the bond on this appeal be and it is hereby fixed at the sum of $250.00.

Dated: January 6, 1947.

Elwyn R. Shaw, District Judge.

[fols. 247-248] In the District Court of the United States

[Title omitted]

Order Approving Appeal Bond—January 6, 1947

The appeal bond of the Brotherhood of Railroad Trainmen having this day been presented herein and the Court having examined the same;

It Is Ordered that said bond be and it is hereby approved.

Dated: January 6, 1947.

Shaw, District Judge.

[fols. 249-255] Bond on appeal for $250.00 approved and filed Jan. 6, 1947, omitted in printing.

[fols. 256-258] Citation in usual form showing service on H. L. Underwood, et al., filed Jan. 10, 1947, omitted in printing.

[fol. 259] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Transcript of Proceedings—Filed January 16, 1947

[fol. 260] Transcript of proceedings had in the above-entitled cause before the Hon. Elwyn R. Shaw, one of the judges of said court, on January 6, 1947.

Present: Mr. Ernest S. Ballard, Mr. Robert McCormick Adams, Mr. Burke Williamson.

[fol. 261] By the Clerk: No. 46 C 275, Baltimore & Ohio Railroad Company vs. Chicago River & Indiana Railroad Company. Motion for order allowing appeal to the Supreme Court, fixing amount of approval bond, and issuance of citation.

Mr. Williamson: Your Honor may recall in this case an order was entered by your Honor denying intervention to the Brotherhood of Railroad Trainmen on November 7, 1946. This, your Honor, is a petition under the statute for appeal to the Supreme Court. Your Honor, I think the amount of bond, which is for costs only since no supersedeas is involved, should be about $250.

The Court: Why should it go directly to the Supreme Court? Why not to the Circuit Court of Apeals?

Mr. Williamson: We may not go to the Circuit Court of Appeals, under Section 225, if an appeal may be taken to the Supreme Court, and under Sections which have been cited here in the jurisdictional statement, I think it is very clear we should go to the Supreme Court of the United States.

The Court: I don't suppose the bond will make much difference.

Mr. Williamson: I don't think so.

Mr. Ballard: No, but I oppose the petition on its merits, and I would like to state briefly the grounds.

This appeal is not a matter of right, and upon presenta-
[fol. 262] tion of this petition to this court it is the function of this court to consider whether the order appealed from is or is not appealable. It is not sufficient that the papers be in order. They are in order. We do not deny that, and we do not deny that the Brotherhood has a right to take this appeal if the order it is appealing from is final; but it seems perfectly clear from the authorities that it is not

a final order, inasmuch as it was a denial of a petition for leave to intervene, the granting or denial of which was within the discretion of this court.

On the main proposition that this court is called upon at this time to pass upon, the question of the appealability of the order from which this appeal is sought to be taken, I would like to call your Honor's attention to the case of Alaska Packers Assn. vs. Pillsbury, etc., et al., 301 U. S. 174, in which the Supreme Court said:

> "While an appeal in a proper case is a matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made."

I would like to suggest further——

[fol. 263] The Court: Does that depend upon the existence of probable cause or——

Mr. Ballard: No, it depends on the finality of the order.

Mr. Williamson: I would be glad to go into this but, frankly, the very purpose of the appeal is to decide whether your Honor was correct in denying us intervention, and to say that it is a matter of discretion in the lower court is completely incorrect.

Your Honor, the statute gives the right to appeal and, obviously, there is no point in arguing again the merits of the case here before your Honor.

The Court: Certainly not. I have decided the merits so far as the intervention is concerned. That is the only order I could make under the petition for leave to intervene, either to grant it or to deny it. I don't know of any other course open, and I denied it because I did not think there was any right to intervene under the statute.

On the question of appeal, I don't know what there is for me there to pass on. Either you have or you have not the right to appeal.

Mr. Williamson: The function of the court this morning is ministerial. You are to look at the papers and nothing——

[fol. 264] The Court: That is the way it seems to me, unless I have other power.

Mr. Williamson: That is all you have. I would be glad to go into the powers here——

Mr. Ballard: I think the authorities are clearly to the contrary.

The Court: Let's hear what you have to say. I will listen to you.

Mr. Ballard: The basic proposition here, that your Honor's function is not merely ministerial, is squarely established by the Alaska Packers case, that the question of the right to appeal is not for the petitioner, but for your Honor, and that you do not perform the ministerial act of seeing whether the papers are in order, but you determine whether the appeal will lie. It will lie only if the order sought to be appealed from is final.

The Court: It is final, as far as these people are concerned. It is final as to them.

Mr. Williamson: That is the whole purpose of the appeal. If we cannot review your Honor's order, we are through.

Mr. Ballard: There is another——

The Court: That is about as final an order as there could be.

Mr. Ballard: Not in the sense here involved. There is [fol. 265] square authority for that.

There is a case identical with this, which was before Judge Wilkerson, which is reported in 15 F. (2d) 443, in which he said in so many words:

> "An order denying such an application (that is, one which appeals to the discretion of the court) does not possess the element of finality, and is not appealable."

And he denied leave to appeal in that case, and he pointed out what the petitioner's remedy is. The petitioner has a remedy. He won't be left remediless. He has a right to appeal to the Supreme Curt for a mandamus on your Honor to grant the petition for leave to appeal.

The Court: That would make two cases for the Supreme Court, instead of one.

Mr. Ballard: But it would let this case proceed.

The Court: It is bad enough to throw one in their lap unnecessarily, but to put two of them there——

Mr. Ballard: But the court says it is entitled to your Honor's judgment as to whether this is an appealable order, and it cannot be an appealable order, which is plain from what is called the California Canneries case, 279 U. S. 553.

> "It (referring to the lower court) did not refer to the [fol. 266] decisions which hold that an order denying

leave to intervene is not appealable, (citing cases), except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit, (citing a number of cases)."

The two cases counsel cites here have no relation to this situation at all. The case they rely on in the Supreme Court is a case where there had been a consent decree which created property rights in the party that was seeking leave to intervene. So it was like a proceeding *in rem*, where there was property in the possession of the court, that intervener had a right to assert a claim to, and if he did not intervene and assert the claim he would have been forever barred.

In the other case that petitioner relies on, title to tidal flats was in issue, exactly like a proceeding *in rem* where the *res* was in the possession of the court, and if the State of California had not been permitted to intervene and assert its rights it would have been cut off permanentlly.

Mr. Williamson: If your Honor please, in answer to Mr. Ballard, all of the arguments which he has made are proper to be made in the Supreme Court by a motion to dismiss the appeal, which I have no doubt he will do.

The Court: A motion to dismiss the appeal?

[fol. 267] Mr. Williamson: Yes. In the case of United States vs. Hancock Truck Lines, 324 U. S. 774, 89 L. Ed. 1357, Justice Roberts said, in passing on one of these points:

"Since appeal is of right, allowance would seem to be but a ministerial act which might be performed by any member of the court."

The Court: If the appeal is of right there is no doubt about that. What statute makes the appeal a matter of right?

Mr. Williamson: I refer your Honor to the jurisdictional statement pursuant to the Supreme Court Rule 12. It appears at 28 U. S. C. A. 345, your Honor.

The Court: Is that the page or the section number?

Mr. Williamson: Section number. That is Section 238 of the Judicial Code.

"Appellate jurisdiction from decrees of United States district courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree

of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

"• • •

"(4) So much of Sections 47 and 47a of this title as relates to the review of interlocutory and final judg-
[fol. 268] ments and decrees in suit to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The Court: Do you contend this is a suit to set aside an order of the Interstate Commerce Commission?

Mr. Williamson: No, to enforce it. Mr. Ballard seeks to enforce compliance with the order of the Interstate Commerce Commission, and does not ask for the payment of money in connection with that order.

The Court: I thought this was for injunction to restrain violation of an order of the Commerce Commission.

Mr. Williamson: He seeks enforcement.

Mr. Ballard: I think there is a question as to which is the type of suit, although that is not the point on which I rely here. The petitioner does not bring himself within the basic requirements of this provision. It says:

"A direct review by the Supreme Court of an interlocutory or final judgment • • •."

This is neither an interlocutory nor final judgment. This is simply an exercise of this court's discretion.

Mr. Williamson: This is a final order as far as the Brotherhood is concerned.

The Court: Was my granting or refusal to grant inter-
[fol. 269] vention a matter of discretion?

Mr. Williamson: No, sir.

Mr. Ballard: Clearly.

Mr. Williamson: We relied on statutes.

The Court: That is the point of the whole thing, whether my original order was a matter of discretion. I do not think it was. I think it was mandatory on me to permit intervention if it was proper, and mandatory on me to deny it if it was improper.

Mr. Williamson: That is correct.

Mr. Ballard: The former is correct, but not the latter. There is a broad class of cases in which intervention is discretionary, and this is such a case.

Mr. Williamson: We relied on statutes. Your Honor found the statutes were not applicable. Therefore, it was either a matter of right or it was not.

The Court: I understood that it was not a matter of discretion where they were allowed to intervene. If it were discretionary I would have denied it on the ground there was no showing that their interests were not properly represented by the other parties of record. I still think it is true——

Mr. Ballard: I would agree with that, but it seems to me once you have disposed of the question of whether it is a matter of right you are still confronted with the question as to whether you will exercise your discretion to permit in-
[fol. 270] tervention.

The Court: If it were a matter of discretion I would have denied it because there was no showing the parties seeking to intervene were not properly represented by other parties of record, but I passed on it as a question of right.

Mr. Williamson: We sought intervention under Rule 24(a) of the Rules of Civil Procedure.

The Court: Yes, and under some rules of the Interstate Commerce Commission.

Mr. Williamson: Yes.

The Court: I do not think it was a matter of discretion on my part.

Mr. Ballard: I agree, but you could have gone further and let them in within your discretion.

The Court: They did not ask to come in on any such ground as that. They made no showing——

Mr. Ballard: If I am not mistaken, I think they made both points.

Mr. Williamson: The original petition made both points, but we abandoned the point of discretion.

The Court: You made no showing that there would not be proper representation.

Mr. Ballard: It was argued at length.

Mr. Williamson: Even under Rule 24(a) it was not a
[fol. 271] matter of discretion.

The Court: Your petition to intervene did not come in under either the rule or the statute.

Mr. Williamson: That was your decision.

The Court: That was not a matter of discretion. That was a matter of definite ruling on a question of law.

Mr. Ballard: May I suggest at this point: That ruling I think is controlling on the merits of this petition. If they had no right to intervene in here they have no right to appeal.

The Court: That is perfectly true——

Mr. Williamson: That is what we want to find out.

Mr. Ballard: And the Supreme Court is entitled to the decision of this court on that question.

The Court: I have given you my decision on that.

Mr. Ballard: I mean on this petition the Supreme Court is entitled to your Honor's decision.

Mr. Williamson: As your Honor pointed out, Congress gave us the right to appeal.

The Court: If you have the right to appeal, you have it because my ruling was a matter of ruling on the law, and not a matter of discretion.

Mr. Williamson: Yes.

The Court: As I see it, you have your right to file your appeal in the Supreme Court and the opposing parties have [fol. 272] a right to file a motion to dismiss that appeal if they disagree with this. I will enter the order.

I think $200 bond is sufficient.

Mr. Williamson: I have one for $250.

The Court: Will you file a transcript of this conversation so that the Supreme Court has some idea of what we are talking about this morning?

Mr. Williamson: Yes, I will see it gets in the record, your Honor.

The Court: All right.

[fols. 273-274] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 275] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 10, 1947

To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Please prepare a Transcript of Record to be certified and transmitted to the Supreme Court of the United States pursuant to the appeal heretofore taken in this cause, and include therein the following:

1. Complaint.

2. Order granting leave to file amendment to complaint;

3. Amendment to complaint herein pursuant to leave of court;

4. Complaint of intervention of Interstate Commerce Commission;

5. Stipulation of facts dated February 25, 1946;

6. Preliminary injunction;

7. Motion of Brotherhood of Railroad Trainmen for leave to file special appearance;

8. Motion of Brotherhood of Railroad Trainmen to vacate temporary injunction and to dismiss proceedings for failure to join indispensable parties;

9. Transcript of proceedings before Hon. Elwyn R. Shaw, Judge, March 18, 1946;

10. Order of March 18, 1946 denying leave to file special appearance and denying leave to file motion to vacate temporary injunction, etc.

11. Answer of defendants, the Chicago River and Indiana Railroad Company (herein called the River Road) and [fol. 276] The New York Central Railroad Company (herein called the Central) to Plaintiffs' Complaint as amended;

12. Motion of Brotherhood of Railroad Trainmen to intervene as defendant, including motion of Brotherhood of Railroad Trainmen to vacate preliminary injunction, to assess damages against plaintiffs, and for summary judg-

ment, including affidavit of Felix E. Kazmer and Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement;

13. Transcript of Proceedings Before Hon. Elwyn R. Shaw, Judge, May 20, 1946;

14. Statement of the Chicago River and Indiana Railroad Company and The New York Central Railroad Company with respect to motion of the Brotherhood of Railroad Trainmen to intervene as defendants in the above entitled cause;

15. Order of November 7, 1946 denying Brotherhood of Railroad Trainmen leave to intervene;

16. Motion of Brotherhood of Railroad Trainmen to amend its motion to intervene as defendant and motion to vacate order denying Brotherhood of Railroad Trainmen leave to intervene;

17. Order of November 26, 1946 denying above motions;

18. Transcript of proceedings before Hon. Elwyn R. Shaw, Judge, November 26, 1946;

19. Petition of Brotherhood of Railroad Trainmen to appeal to Supreme Court of the United States from order denying leave to intervene;

20. Assignment of errors for appeal by Brotherhood of Railroad Trainmen from order denying intervention;

21. Jurisdictional statement pursuant to Supreme Court Rule 12;

22. Order allowing appeal to Supreme Court of the United States from order denying leave to intervene;

23. Bond on Appeal;

24. Order approving appeal bond;

25. Proof of Service of copy of petition for and order allowing appeal, together with a copy of the assignments of error and jurisdictional statement pursuant to Rule 12 of the Supreme Court, and statement directing attention to the provisions of paragraph 3 of Rule 12 of the Supreme Court;

26. Citation and proof of service;

27. Praecipe and proof of service;

28. Clerk's certificate;

[fol. 277] 29. Transcript of Proceedings Before Hon. Elwyn R. Shaw, Judge January 6, 1947.

and such other matters as, under the rules of the Supreme Court of the United States, you may be required to certify.

Robert McCormick Adams, Burke Williamson, Adams Nelson & Williamson, 39 South LaSalle Street, Chicago 3, Illinois, Franklin 2411. E. Douglas Schwantes, 175 West Jackson Boulevard, Chicago 4, Illinois, Harrison 4060, Attorneys for Brotherhood of Railroad Trainmen.

Dated: January 8, 1947.

Service of the foregoing Praecipe for transcript of record and the receipt of a copy thereof are hereby acknowledged this 9th day of January, 1947.

Ernest S. Ballard, William F. Price, Walter I. Deffenbaugh, Pope & Ballard, By Walter I. Deffenbaugh, Counsel for Plaintiffs-Appellees. Sidney C Murray, Marvin A. Jersild, By Sidney C. Murray, Marvin A. Jersild, Counsel for certain Defendants-Appellees. Ralph M. Shaw, Guy A. Gladson, Bryce L. Hamilton, Winston, Strawn & Shaw, By Ralph M. Shaw, Guy A. Gladson, B. P. Hamilton, Counsel for certain Defendant-Appellee.

[fols. 278-300] District of the United States,
State of Illinois,
County of Cook, ss:

Lucile M. Ingham, being first duly sworn, deposes and says that she served the foregoing Praecipe for transcript of record on H. L. Underwood, counsel for Interstate Commerce Commission, Intervening Plaintiff-Appellee, 3341 Interstate Commerce Commission Building, Washington, D. C., by depositing in the United States mail, postage prepaid, a copy thereof in an envelope duly sealed and addressed to said H. L. Underwood at said address, on the 8th day of January, 1947, at Chicago, Illinois.

Lucile M. Ingham.

Subscribed and Sworn To before me this 8th day of January, 1947. Agnes Stasio, Notary Public. (Seal.)

[fol. 301] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 302] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED ON AND DESIGNATION OF RECORD FOR PRINTING—Filed January 31, 1947

Statement of Points

Apellant, Brotherhood of Railroad Trainmen, on its appeal to the Supreme Court of the United States from the order denying intervention entered by the District Court November 7, 1946, intends to rely on the following points:

1. The District Court erred in failing and refusing to hold that the employees as trainmen of the defendant The Chicago River and Indiana Railroad Company, by reason of [fol. 303] their contract with said railroad providing for performance by them of work which this suit seeks to enjoin them from performing, have rights and interests in the subject matter of this suit which cannot be adjudicated without making said employees parties, and that said employees or their representative is therefore an indispensable party to this action.

2. The District Court erred in failing and refusing to hold that the issuance of a preliminary injunction in this proceeding, enjoining the employees of defendant The Chicago River and Indiana Railroad Company from doing work which they were then doing and depriving them of such employment, gives to said employees, or their representative, such an interest in the subject matter of this suit as can be protected only by intervention herein.

3. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen, as representative of employees as trainmen of defendant The Chicago River and Indiana Railroad Company, is entitled of right to intervene herein for the purpose of moving to vacate the preliminary injunction issued against such employees without compliance with the Federal statutes relating to injunctions in labor disputes, and moving to assess damages against plaintiffs, and moving for summary judgment.

4. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen, as representative of indispensable parties not joined in this suit,

has an absolute right to intervene and be made a party herein.

5. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen is entitled to intervene of right under Rule 24(a) (1) of the Rules of Civil Procedure for District Courts of the United States in that statutes of the United States confer an unconditional [fol. 304] right to intervene, as follows:

(a) Section 17 (11) of the Interstate Commerce Act, Chapter 1 (49 U. S. C. A. Sec. 17 (11)) provides that representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under that Chapter affecting such employees.

(b) Sections 212 and 213 of the Judicial Code (28 U. S. C. A. 45a) provide that associations interested in a suit brought by anyone relating to action by the Interstate Commerce Commission may at any time intervene in said suit.

6. The District Court erred in failing and refusing to hold that the Brotherhood of Railroad Trainmen, as representative of employees as trainmen of the defendant The Chicago River and Indiana Railroad Company, is entitled to intervene of right under Rule 24(a) (2) of the Rules of Civil Procedure for District Courts of the United States in that representation by existing parties of the interests of such employees is inadequate and such employees are or may be bound by a judgment in this action.

7. The District Court erred in failing and refusing to hold that the provision of the Interstate Commerce Act, Chapter 1 (49 U. S. C. A. Sec. 5 (2) (f)) guaranteeing to employees of a railroad carrier, acting through their duly authorized representative, the right to enter into agreements with said carrier for the protection of the interests of said employees is applicable to the settlement agreement of January 23, 1946 made by the Brotherhood of Railroad Trainmen on behalf of employees as trainmen of defendant The Chicago River and Indiana Railroad Company, and that the interests of said employees under their said agreement, which is sought to be nullified by this suit, [fol. 305] can be protected only by allowing their representative to intervene herein.

Designation of Record

Appellant deems the entire record, as filed in this Court, necessary for the consideration of the points relied on.

Dated: January 23, 1947.

E. Douglas Schwantes, Counsel for Appellant, 175 West Jackson Boulevard, Chicago 4, Illinois, Harrison 4060.

Service of the foregoing STATEMENT OF POINTS RELIED ON and DESIGNATION OF RECORD FOR PRINTING and the receipt of a copy thereof are hereby acknowledged this 23rd day of January, 1947.

Ernest S. Ballard, William F. Price, Walter I. Deffenbaugh, Pope & Ballard, by Pope & Ballard, Counsel for Plaintiffs-Appellees. Sidney C. Murray, Marvin. A. Jersild, by Marvin A. Jersild, Counsel for certain Defendants-Appellees. Ralph M. Shaw, Guy A. Gladson, Bryce L. Hamilton, Winston Strawn & Shaw by Winston Strawn & Shaw, Counsel for certain Defendant-Appellee.

[fol. 306] DISTRICT OF THE UNITED STATES,
State of Illinois,
County of Cook, ss:

LUCILE M. INGHAM, being first duly sworn, deposes and says that she served the foregoing STATEMENT OF POINTS RELIED ON and DESIGNATION OF RECORD FOR PRINTING on H. L. UNDERWOOD, counsel for Interstate Commerce Commisson, Intervening Plaintiff-Appellee, 3341 Interstate Commerce Commission Building, Washington, D. C., by depositing in the United States mail, postage prepaid, a copy thereof in an envelope duly sealed and addressed to said H. L. Underwood at said address, on the 23rd day of January, 1947, at Chicago, Illinois.

Lucile M. Ingham.

Subscribed and sworn to before me this 23rd day of January, 1947. Agnes Stasio, Notary Public. (Seal.)

[fol. 306a] [File endorsement omitted.]

[fol. 307] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 970

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—March 3, 1947

The statement of jurisdiction in this case having been submitted, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Endorsed on Cover: File No. 51,834. Northern Illinois, D. C. U. S., Term No. 970. Brotherhood of Railroad Trainmen, an Unincorporated Association, Appellant vs. The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, et al. Filed January 31, 1947. Term No. 970 O. T. 1946.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION

E. DOUGLAS SCHWANTES,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

JURISDICTIONAL STATEMENT PURSUANT TO SUPREME COURT RULE 12

The basis on which it is contended, on behalf of the Brotherhood of Railroad Trainmen, that the Supreme Court of the United States has jurisdiction on appeal to review

the order of the District Court entered herein on November 7, 1946 denying the motion of the Brotherhood of Railroad Trainmen to intervene herein, is as follows:

1. Statutory Provisions Sustaining Supreme Court Jurisdiction

Plaintiff's Complaint discloses that this is a suit to enforce an order of the Interstate Commerce Commission other than for the payment of money. Plaintiffs rely on a condition in an order of the Interstate Commerce Commission of May 16, 1922 providing that "present traffic and operating relationships" existing between plaintiff and defendant carriers "shall be continued." It is contended by plaintiffs that this condition requires that they be permitted to move certain cars over the lines of defendant The Chicago River and Indiana Railroad Company, hereinafter referred to as the River Road, *with plaintiffs' own power and crews,* and that the practice of the River Road, commenced February 1, 1946, of using its power and crews for such work is violative of the above order. A mandatory injunction is sought to compel the River Road and its employees to permit plaintiffs to accomplish such movements with the plaintiffs' own power and crews.

The Judicial Code, Section 238 (28 U. S. C. A. 345) provides in part as follows:

> "Appellate jurisdiction from decrees of United States district courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:
>
> • • • • • • •
>
> "(4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judg-

ments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

Section 47a of the Title 28 provides in part as follows:

"Appeal to Supreme Court from final decree; time for taking; priority. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases . . . Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court."

Section 44 of the same title provides in part as follows:

"Procedure in certain cases under interstate commerce laws; service of processes of court. The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title. . . . ."

2. Order Sought to Be Reviewed

The order denying the motion of the Brotherhood of Railroad Trainmen to intervene as a party defendant was entered by the District Court on November 7, 1946, as appears from the transcript of record herein at page 208. The motion of the Brotherhood to vacate that order was denied on November 26, 1946, as appears from the transcript of record at page 210. No opinion was delivered by

the District Court upon the rendering of said order of November 7, 1946. Said order is as follows:

> "Motion of Brotherhood of Railroad Trainmen for leave to intervene denied."

Appeal from said order of November 7, 1946 by said Brotherhood is by application presented on January 6, 1947, as appears from the transcript of record herein at page 244.

3. Nature of Case and Appealability of Order Denying Intervention

As above indicated, this suit, filed February 12, 1946, sought, *inter alia*, an injunction against the defendant railroads and their employees, commanding them to permit plaintiff railroads to move empty cars for loading livestock other than hogs and sheep with plaintiffs' own power and crews over the lines of defendant River Road, and, after such cars have been loaded, to move them over the lines of the River Road to plaintiffs' lines. The Complaint alleged that on or about January 25, 1946 defendant River Road notified plaintiffs that from February 1, 1946 such movement of cars would be performed by the power and crews of the River Road, and that thereafter the River Road and its employees refused to permit their lines to be so used by plaintiffs with plaintiffs' own power and crews, and that the River Road required that such movements be accomplished with the power and crews of the River Road.

On March 14, 1946 a preliminary injunction was granted against defendant railroads and their employees as prayed for in plaintiffs' Complaint. Neither the employees of the defendant railroads nor any of their representatives were made parties to this suit, and no notice of plaintiffs' application for an injunction was served on them.

On May 20, 1946 the Brotherhood of Railroad Trainmen, as representative of employees as trainmen of the defendant River Road, filed its motion to intervene as a party defendant, alleging that such employees, or their representative, are indispensable parties; that an unconditional right to intervene is conferred upon them by Federal statute; that the representation of said employees by the then parties was inadequate; and that said employees are or might be bound by a judgment in the suit within Rule 24(a), Intervention of Right, of the Rules of Civil Procedure for District Courts of the United States. This motion disclosed that prior to the institution of this suit, said Brotherhood, as collective bargaining representative for all persons employed as trainmen by defendant River Road, had entered into a written agreement with that railroad under the terms of which such employees are entitled to perform all work done by trainmen on the lines of that railroad. This motion set forth that the primary purpose and effect of this suit is to nullify the said employment contract and the rights of the trainmen thereunder, and that without notice or opportunity to be heard, they had been deprived by injunction from performing the work to which they are entitled under their employment contract. The Brotherhood prayed leave to intervene as a defendant and to file instanter its motion to vacate the preliminary injunction, to assess damages against plaintiffs, and for summary judgment.

The facts as above outlined were set forth in the motion of said Brotherhood to intervene and in the proposed pleadings and affidavits attached thereto and have not been disputed.

The District Court order of November 7, 1946 denying the motion of the Brotherhood to intervene as a matter of right disposes of this case in so far as the Brotherhood is concerned and it is therefore a final judgment or decree

within the meaning of the jurisdictional statutes above cited providing for direct review by the Supreme Court.

Missouri-Kansas Pipe Line Company v. *United States*, 312 U. S. 502, 85 L. Ed. 975, 61 S. Ct. 666 (1941); *State of Washington* v. *United States*, 87 F. (2d) 421 (1936).

4. Substantial Questions Involved

The substantial questions involved on this appeal include the following:

(a) Whether an employment contract made by a railroad carrier with its employees, acting through their bargaining representative in accordance with the Railway Labor Act, gives to such employees or their representative the right to be made a party and to be heard in a suit brought by other carriers, the effect of which is to enjoin the performance of that employment contract.

(b) Whether in a suit brought against a railroad carrier wherein it is contended that performance of a contract between the carrier and its employees is violative of an order of the Interstate Commerce Commission, the employees with whom such contract was made are entitled to intervene and be heard on the question whether any such violation exists.

(c) Whether employees of a railroad carrier, having been prevented by injunction from performing work under a contract with their employer, are entitled to intervene and be heard in the proceeding wherein such injunction was issued, and to move the Court to vacate such injunction for failure to join indispensable parties and for failure to comply with the Federal statutes regarding issuance of injunctions in labor disputes.

(d) Whether Section 17(11) of the Interstate Commerce Act, Chapter 1 (49 U. S. C. A. 17(11)), providing that rep-

resentatives of employees of a carrier may intervene and be heard "in any proceeding" arising under that chapter "affecting such employees," confers an unconditional right upon the representative of employees of a carrier to intervene in a suit brought under that chapter to enjoin performance of an employment contract between the carrier and its employees.

(e) Whether Sections 212 and 213 of the Judicial Code (28 U. S. C. A. 45a), providing that associations interested in a suit brought by anyone relating to action by the Interstate Commerce Commission may intervene in said suit, confers an unconditional right upon an employees' association to intervene in a suit based on an Interstate Commerce Commission order wherein it is asserted that enforcement of said order requires an injunction against performance of an employment contract between a carrier and its employees.

(f) Whether adequate representation guaranteed to all interested parties by Rule 24(a) of the Rules of Civil Procedure for District Courts of the United States requires allowance of intervention by employees of a railroad carrier in a suit against such carrier brought to nullify a contract between it and its employees wherein such carrier has stated frankly that it does not act for or represent its employees in such suit.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal.

Dated: January 4, 1947.

E. Douglas Schwantes,
Counsel for Appellant,
175 West Jackson Boulevard,
Chicago 4, Illinois.
Harrison 4060.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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Attorney for Appellant,
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Chicago 4, Illinois.

THE LAWYERS PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970.

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY; AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

JURISDICTION ON APPEAL.

For brevity, short forms of party names will be used. The appellant, Brotherhood of Railroad Trainmen, an unincorporated association, applicant for intervention, will

be called the Brotherhood. The plaintiffs-appellees, eight railroad companies which brought the suit in the district court, will be called the plaintiffs. The intervening plaintiff-appellee, Interstate Commerce Commission, will be called the Commission. The principal defendant-appellee, The Chicago River and Indiana Railroad Company, employer of the Brotherhood members, will be called the River Road.

This appeal was taken by the Brotherhood on January 6, 1947 from the order of the district court of November 7, 1946, denying its motion to intervene as a party defendant, the application to intervene having been made as a matter of right. Jurisdiction of the Supreme Court is invoked under those sections of the Judicial Code which provide for direct review by this court of a final judgment or decree of a district court in a suit to enforce an order of the Commission other than for the payment of money.

> Judicial Code, Section 238 (Expediting Act), (28 USCA Sec. 345), Section 210 (28 USCA Sec. 47a), and 28 USCA Sec. 44.

Since the applicability of the above sections to this case is questioned by plaintiffs only on the point of whether the order appealed from is a "final judgment or decree" within the meaning of these jurisdictional provisions, and that is the only question raised by their motion to dismiss (Tr. 299-300), we shall treat the subject below under Argument.

STATEMENT OF THE CASE.

We believe the facts in the case material to a consideration of the questions presented on plaintiffs' motion to dismiss or affirm are adequately stated in the Brotherhood's Jurisdictional Statement, paragraphs 1-3 (Tr. 236-240). A more extensive treatment, which we think includes many extraneous matters, is found in plaintiffs' opposing statement (Tr. 281-289).

Two inaccuracies in plaintiffs' statement may be worthy of mention, although we think they concern the merits of the case below rather than the Brotherhood's right to intervene. Plaintiffs state that the employment contract between the employees, represented by the Brotherhood, and their employer "could not have been in existence" on May 16, 1922, the date of the Commission order on which this suit is based (Tr. 288-289). The contract was signed on December 20, 1919, as is shown by the copy of it in the record (Tr. 174).

Plaintiffs also state (Tr. 284) that the moving of cars by the plaintiffs "*with their own power and crews*" over the line of the River Road was referred to in the Commission report of May 16, 1922 as "the only practical method of handling that traffic." The paragraph of the report from which that quotation was taken mentions only the "own power" of plaintiffs, and not their "own power and crews" (Tr. 23).

SUMMARY OF ARGUMENT.

I.

The motion to dismiss for lack of jurisdiction should be denied because the order appealed from is final and is therefore appealable to this court under the applicable statutes. Plaintiffs' motion to dismiss for lack of jurisdiction is grounded solely on their contention that the order appealed from is not a final, appealable order. The Brotherhood concedes that if the order is not a final one, it is not appealable 7

An order denying intervention of right is appealable. If the interest asserted by the applicant for intervention is such that he must be allowed to intervene in the suit as a matter of right, an order denying him intervention constitutes a final adjudication that no such interest has been asserted; it concludes the case as to him and is therefore appealable..... 7-8

The question of what interest a party must have to entitle him, as a matter of right, to intervene must therefore be considered..... 8

The Brotherhood, as an indispensable party, has an absolute right to intervene. Its interest is such as to bring it within the definition of indispensable party. The trainmen of the River Road, by virtue of their contract providing that they shall perform all yard work on that railroad, are indispensable parties to this suit, because by this suit the plaintiffs seek to adjudicate directly on the rights of the trainmen under their contract..... 9-11

Plaintiffs' argument that the employees of the River Road have no interest to protect in the litigation erroneously presupposes that the provision, enacted in 1940, of the Interstate Commerce Act (49 USCA Section 5 (2) (f)), guaranteeing to carriers and their employees that "hereafter" they shall have freedom to enter into contracts for the protection of employees, can have no application to this case, even though the River Road and its employees made such an agreement on January 23, 1946..... 11

Plaintiffs' argument that the employees' contract gives them no interest in this suit in view of the Commission's order relies on plaintiffs' unwarranted assumption that the contract is in fact violative of that order. The order contains questions of interpretation and construction as to which full argument should be heard to decide whether the order and the contract can or cannot be reconciled. To hold that since the plaintiffs say the contract is violative of the order, then those claiming under the contract may be enjoined from so doing but have no interest in and are not entitled to participate in the suit, lest they say something to the contrary, is plainly a preadjudication, *ex parte*, of the case on the merits 11-12

The court below also assumed that a violation of the Commission order exists in this case even before the principal parties charged with such violation are in court 12-14

Intervention of right is provided by Federal statutes. Rule 24 (a) (1) of the Rules of Civil Procedure for District Courts of the United States requires allowance of intervention as a matter of right when provided for unconditionally by Federal statute. The

Brotherhood relies on two such statutes: Section 17 (11) of the Interstate Commerce Act, Part I, (49 USCA Chap. 1, Sec. 17 (11)) and Judicial Code, Sections 212, 213 (28 USCA Sec. 45a).....15-18

The Brotherhood is entitled to intervention of right under Rule 24 (a) (2) of the Rules of Civil Procedure for District Courts granting to "anyone" the right to intervene "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." The only litigant in the case who might have defended the employees' employment contract is the River Road, the other party to that contract. The River Road has stated that it feels no duty whatever "to represent in this suit the interests of the Brotherhood", and its acts and failures to act bear that out.....18-20

II.

The motion to affirm for lack of substantial question should be denied. Plaintiffs, in the alternative, have moved to affirm the order denying the Brotherhood leave to intervene because the questions involved are said to be not substantial. Substantial questions involved in the appeal include not only whether employees of a carrier are, under the Rules of Civil Procedure, entitled to be heard in a suit intended to nullify the employment contract between the employees and the carrier but also the correct interpretation of a Federal statute believed to establish the validity of such a contract and of two Federal statutes believed to guarantee to employees the right to be heard.....20-21

ARGUMENT.

I.

The Motion to Dismiss for Lack of Jurisdiction Should Be Denied Because the Order Appealed From Is Final and Is Therefore Appealable to This Court Under the Applicable Statutes.

The jurisdictional statutes above cited provide that direct review by this court may be had of a final order entered in a suit brought to enforce an order of the Commission other than for the payment of money. The pertinent provisions were fully quoted in the Brotherhood's Jurisdictional Statement (Tr. 237-238). And there is no question that the order appealed from was entered in a suit brought, as the complaint states, under "the Interstate Commerce Act for enforcement of an order of the Interstate Commerce Commission" other than for the payment of money (Tr. 6).

Plaintiffs' motion to dismiss for lack of jurisdiction is grounded solely on their contention that the order appealed from is not a final, appealable order (Tr. 299-300). From this we believe it may be fairly assumed plaintiffs concede that if the order is a final one, then the appeal was properly taken under the Expediting Act, and this court has jurisdiction to consider it. Conversely, we concede that if the order is not a final one, it is not appealable.

(a) An Order Denying Intervention of Right Is Appealable.

The authorities are in general agreement that the finality, and thus the appealability, of an order denying intervention depends on the nature of the interest sought to be protected by intervention. The rule may be broadly stated

as follows: If the interest asserted by the applicant is such that he must be allowed to intervene in the suit as a matter of right, an order denying him intervention constitutes a final adjudication that no such interest has been asserted; it concludes the case as to him and is therefore appealable. The rule is concisely stated in *Alston Coal Co.* v. *Federal Power Commission*, 137 F. 2d 740, at 741:

> "It is a well settled principle of law that where intervention is a matter of right, an order denying the right to intervene is a final, appealable order."

The same rule is recognized by this court in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 85 L. ed. 975, in which a former decree had expressly provided for intervention by the Panhandle Company. In reversing the district court order denying intervention to this company, the court said (at 508 of the U. S. report):

> "And since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable."

It is therefore clear that if the intervention sought was as a matter of right, rather than a matter in the trial court's discretion, an order denying intervention is final and appealable.

And so we may now turn to the question of what interest in the litigation the party seeking intervention must have in order to entitle him, as a matter of right, to participate therein.

(b) The Brotherhood, as an Indispensable Party, Has an Absolute Right to Intervene.

Surely if the applicant can show that his interest is such as to make him an indispensable party, he has an absolute right to intervene. We submit that the trainmen of the River Road, by virtue of their contract providing that they shall perform all yard work on that railroad, are indispensable parties to this suit, because by this suit the plaintiffs seek to adjudicate directly on the rights of the trainmen under their contract. The fact that the performance or non-performance of that contract is the very essence of this litigation is shown not only by the Brotherhood's motion to intervene (Tr. 135-147), but by the issues as set forth in the complaint (par. 13, Tr. 10-11) and the answer of the River Road (3rd Defense, Tr. 127-130). To nullify the Brotherhood's contract and enjoin its performance is the obvious purpose of this suit, and would inevitably be a direct result of a decree in plaintiffs' favor. The long settled rule in this regard is plainly stated in *Mallow* v. *Hinde*, 12 Wheaton 194, 25 U. S. 116, at 119-120 of the U. S. report:

> "* * * no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

This rule was the basis for the often quoted definition of indispensable parties stated in *Shields* v. *Barrow*, 17 How. 130, 58 U. S. 409, 15 L. ed. 158, as follows at page 411 of the U. S. report:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The test of indispensability as applied to a party who was not joined, but is seeking intervention, is treated in

International Brotherhood v. *Keystone Freight Lines*, 123 F. 2d 326. In that case a motor carrier sought a mandatory injunction to compel certain other motor carriers to resume handling of freight forwarded by the plaintiff to the defendants in accordance with alleged contractual relations existing between them. The labor union representing the employees of the defendant carriers sought leave to intervene on the ground that the employees had an employment contract with the defendants under which they were entitled to refuse to handle plaintiffs' freight, that they had so refused to handle it, and that the relief sought by plaintiffs would deprive them of their rights under that contract. Regarding the nature of the union's interest in the suit, the court said (at 329):

> "As has been pointed out, Plaintiff sought affirmative relief not only against the defendant companies but also against Intervenor and its members when it prayed for an injunction against defendants, their agents, servants and employees. If the allegations of Intervenor's pleading are taken as true, it is the real party in interest. In any event, under the issues as framed by the petition, it had a substantial interest in the controversy and was a necessary party thereto. Its right of intervention was not permissive, but absolute, under Rule 24(c), and it was error to deny its application for intervention."

The factual similarity of that case to this one is readily apparent. Yet in our case plaintiffs argue that because of the "antecedent" order of the Commission of 1922, the employment contract between the Brotherhood and their employer is unavailing to create an interest in the Brotherhood which entitles it to intervene in this suit (Tr. 289-290). The making of this argument should in itself dispel any doubt that the actual purpose of this suit is to nullify the Brotherhood's employment contract without opposition on the merits from the real party in interest. This is so be-

cause the record already made by the Brotherhood shows that the "antecedent" quality of the Commission's order is highly questionable, to say the least, inasmuch as the original contract in question is dated in 1919. This point may well become material in determining, at a trial on the merits, the exact nature of the "status quo" of operating relationships which plaintiffs say should be maintained, but it is obviously premature to resolve the question in advance, and thus to determine whether the Brotherhood has stated an interest in the suit which will sustain intervention.

But regardless of the respective dates of these documents or their relative efficacy, the plaintiffs' argument also presupposes that the provision enacted in 1940 of the Interstate Commerce Act (49 USCA Sec. 5 (2) (f)), guaranteeing to carriers and their employees, that "hereafter" they shall have freedom to enter into contracts for the protection of employees, can have no application to this case. Whether the Commission's order, interpreted in the light of this statutory provision, can be said to render null and void the original contract and the agreement of January 23, 1946 between the Brotherhood and the River Road is plainly a matter which should be heard on the merits, and not one which can be prejudged in the plaintiffs' favor at the outset so as to decide that the Brotherhood has no interest to be protected, and thus no right to intervene.

But the most serious fallacy of plaintiffs' argument that the employees' contract can reveal no right or interest in view of the Commission's order lies in their wholly preemptive assumption that the contract is in fact violative of the order.

As already pointed out in our statement of the case, the report of the Commission does not state whose employees handle foreign line traffic on the tracks of the River Road. Nor does the order of the Commission cover this item (Tr. 46). Even if it were granted that the order does require

the River Road to permit plaintiffs to use their own switch engines on River Road tracks, surely it does not necessarily follow that foreign crews are also included.

Again, the report of the Commission does not state that empty cars for loading livestock other than hogs and sheep are moved to points of loading by the foreign carriers and, on the contrary, the report implies that such movements are handled by employees of the River Road or its predecessor (Tr. 23).

These are matters of interpretation and construction on which all sides should be heard, and are only some of many points which must be considered, on their merits, in deciding whether the order and the contract can or cannot be reconciled. In no other way can it be fairly determined whether the order has been violated. To hold in advance that for the purpose of deciding who shall be parties, only the plaintiffs' side of these questions can be considered is manifest injustice. To hold that since the plaintiffs say the contract is violative of the order, then those claiming under the contract may be enjoined from so doing but are not entitled to participate in the suit, lest they say something to the contrary, is plainly a pre-adjudication, *ex parte*, of the case on the merits. It cannot be denied that the plaintiffs' chances for success in the case are greatly enhanced when their real adversaries are kept out of it, and such a procedure no doubt makes for a speedy determination of the controversy, but it can hardly be described as a judicial process. Yet the trial judge's remarks concerning the order and the contract clearly suggest such an approach. Pertinent excerpts follow:

Tr. 105:

> "The Court: Well, either you (the Brotherhood) are an indispensable party or you are not an indispensable party, one or the other; I don't know which it is. But it is one or the other. If you are an indispensable

party, acts that have been taken heretofore without your being joined would not be binding on you.

"Mr. Williamson: Yes.

"The Court: If you are not an indispensable party, then you haven't any business in here."

Tr. 108-109:

"The Court: Could that contract affect a previously existing order of the Interstate Commerce Commission?

"Mr. Williamson: Your Honor, this contract has been in effect for some time. There has been a controversy between the employees and the railroad for years, as to the effect—

"The Court: I am asking you about an order of the Interstate Commerce Commission. Could that contract affect that order?

"Mr. Williamson: I am not here to argue the merits, but I would say that contract—

"The Court: Then there is no use of having an Interstate Commerce Commission. You might as well turn this over to private bargaining."

Tr. 111-112:

"The Court: This Court intended to hold, right or wrong, that a unilateral agreement between a couple of parties cannot affect an order of the Interstate Commerce Commission. If that order is bad it must be attacked directly through the means provided by law, and not by a collateral agreement between two parties. That is my intention, to so hold, and that is what I held, so far as I know, unless there is something in the order which I overlooked.

"Your position, I take it, is that the Trainmen can make an agreement with one of the parties that will affect, offset an order of the Interstate Commerce Commission which has been in force for many years. I take it that is your position.

"Mr. Williamson: That is a question of the merits.

"The Court: I don't know why you can't submit it to this Court as a matter of law, and then if it goes

to the Circuit Court of Appeals or the United States Supreme Court, it can go on some kind of a simple record."

Tr. 203:

"The Court: I took the position and I intend to adhere to the position, that an order of the Commerce Commission cannot be avoided by private contracts between any individuals or groups of individuals or railroad companies, or anybody else. If there is relief wanted from such an order of the Commission it must be obtained in the statutory manner and through the regular channels. That is the holding I made and that I will keep on making.

"I do not know what you will file in the way of briefs, but you may as well know it now."

We believe it is evident from the above that the trial court has fallen into plaintiffs' error of assuming that a violation of the Commission order exists in this case even before the principal parties charged with such violation are in court. It is also apparent that the court below has adopted plaintiffs' notion that any defense urged against the violation as charged constitutes an attack on the order itself, and is therefore absolutely forbidden except in a suit brought by the offender before three judges under the Urgent Deficiencies Appropriation Act (28 U. S. C. A. Sec. 47).

With all respect due a Commission order, we submit that employees may look at it and may even suggest, without *lese majesty*, that the order might be so interpreted that their right to work may exist within the order.

(c) Intervention of Right Is Provided by Federal Statutes.

Rule 24 (a) (1) of the Rules of Civil Procedure for District Courts of the United States requires allowance of intervention as a matter of right when provided for unconditionally by Federal statute. The Brotherhood relies on two such statutes.

Section 17(11) of the Interstate Commerce Act, Part I, (49 U. S. C. A. Chapter 1, Sec. 17(11)), provides as follows:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

The words "this chapter" (Chapter 1) as used above refers to the same chapter under which this suit was brought, as is shown by plaintiffs' complaint, par. 6 (Tr. 6). Under this provision the only inquiries which could properly be made in our case are whether the Brotherhood is the "duly designated" representative of River Road employees, and whether this proceeding affects such employees. If both facts exist, the right to intervention is established. Both are amply covered in the Brotherhood's motion to intervene, and are not disputed by plaintiffs.

The only argument advanced by plaintiffs against the conclusion that the above statutory provision requires the District Court to allow intervention by the Brotherhood in this case is their contention that the provision applies only to proceedings before the Commission, and not to court proceedings (Tr. 295). Such a construction of the statute would obviously require, at the outset, insertion of new words into the statute so that the above phrase "any proceeding arising under this chapter" would be changed to read "any proceeding before the Commission arising under this chapter." Plaintiffs apparently believe they can add

these words to the statute because the heading of that section contains the phrase "Commission Procedure" and that therefore the portion of the section in question refers only to proceedings before the Commission. If such were the intention of Congress, then the phrase in question would certainly not be "any proceeding arising under this *chapter*", but would read instead "any proceeding arising under this *section.*"

Plaintiffs do not even hint at any reason why Congress should have intended by this provision to grant railroad employees the right of intervention in Commission proceedings, and yet withhold such protection as to court proceedings. We have only plaintiffs' unsupported suggestion that a result so patently inconsistent and unjust as this is the true intent of the law, although that result necessarily involves the doing of violence to the clear meaning of the words used in the law and the insertion of words which are not there.

The second statutory provision relied on by the Brotherhood in seeking intervention of right is the Judicial Code, Sections 212, 213 (28 U. S. C. A. Sec. 45a), the pertinent portions of which are as follows:

> "associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof;"

The "aforesaid sections" referred to in this provision include section 44 of the same title, relating to suits to enforce a Commission order other than for the payment of money.

This provision is so obviously applicable to a case of this nature that plaintiffs have made no attempt to argue other-

wise. Their contention is that since the provision only requires that intervention be granted to those associations which are "interested" in the suit, and the statute itself does not define this term, it must mean the same degree of interest which is required for intervention generally (Tr. 296). In other words, if an association can show its right to intervene without this statutory provision, then plaintiffs are willing to concede that the statute does not bar it. That is merely a roundabout way of saying the statute means nothing.

We submit that a much more logical and not too liberal interpretation of this provision in the statute is that an association seeking intervention must be allowed to do so on the showing of some legal interest in the suit as distinguished from a mere casual or frivolous interest, but that the interest shown may be something less than that which would entitle the party to institute the suit, or which is generally required of intervenors. Cf. *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113, 77 L. ed 1069.

We think neither the words nor the spirit of this statute would be strained if, for example, it were held that an association whose members have been thrown out of certain employment by the terms of an injunction issued in the suit it seeks to enter has by this fact alone shown a sufficient interest to satisfy the requirements of the statute allowing intervention.

The only case cited by plaintiffs on this point is *Boston Tow Boat Co.* v. *U. S.*, 321 U. S. 632, 88 L. ed. 975. In that case the intervenor was allowed to intervene in the suit in the District Court on a mere showing that its business was somewhat similar to that of the plaintiff in the case, and that it might be adversely affected by the precedent established if the decision went against the plaintiff, *i. e.*, if the plaintiff were held to be subject to the Interstate Commerce Act. From a decision on the merits against plaintiff, the

intervenor sought a separate appeal, and the sole question presented and decided was that the intervenor did not have the right to prosecute an independent appeal. On the subject of intervention, the court, speaking through Mr. Justice Black, said (p. 634 of U. S. report):

> "Whether Boston had sufficient interest to intervene as of right before the Commission and in the District Court we need not decide, the issue here being only whether Boston has such an 'independent right which is violated' by the decision against Cornell as will support an independent appeal."

The interest shown by the Brotherhood in its application for intervention is vastly greater than to avoid establishment of an unfavorable precedent. We think the above case, to the very limited extent pertinent to our case, favors allowance of intervention by the Brotherhood.

(d) The Brotherhood Is Entitled to Intervention of Right Under Rule 24 (a) (2) of the Rules of Civil Procedure.

This rule is as follows:

> "Rule 24. Intervention.
>
> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in any action * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;"

The fact that representation of the employees' interest by existing parties "is or may be inadequate" is not open to serious question. The only litigant in the case who might have defended the employees' employment contract is the River Road, the other party to that contract. The River Road has shown it does not view the contract in nearly the same light as does the Brotherhood; it acknowledges adversity of interest thereunder, and feels no duty what-

ever "to represent in this suit the interests of the Brotherhood" (Tr. 187-190). The River Road by its answer pleads in effect an apology for the contract, and especially for its part in the making of it, explaining that the settlement interpretation of January 23, 1946 "was entered into by the River Road solely to prevent the said threatened strike" (Tr. 130). It is clear enough from this fact alone that the River Road, as obligor under a contract it frankly considers onerous, is in no position to champion the defense of a suit which may relieve it of its obligations thereunder. And considering the nature and extent, not to mention results, of the defense effort thus far made by the River Road, it is all too plain that to say this representation of the employees' interest "is or may be inadequate" is a gross understatement. We think it is unnecessary to review here all the inadequacies in the River Road's defense which were specified in the Brotherhood's motion to intervene (Tr. 141-145). One example we consider typical is the failure of the River Road to invite the court's attention, in view of the labor dispute between it and the Brotherhood, to the applicability of the Norris-LaGuardia Act (29 U. S. C. A. Sections 101-115). A case which squarely holds that the Act is applicable is *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. 2d 931, certiorari denied in 317 U. S. 645, 87 L. ed. 519. It holds, in a factual situation strikingly similar to this one, that the suit for injunction must be dismissed. No mention of the Act or of this case was made by the River Road in opposition to the injunction sought and issued here, although its counsel later acknowledged that they had considered both the Act and the case, "but were not persuaded that they were applicable or decisive" in this suit (Tr. 189).

The only remaining requirement of Rule 24 (a) (2) is that the applicant for intervention of right "is or may be bound by a judgment in the action." The employees are

already under a temporary injunction issued in this action commanding them to let others do work allotted to them under their employment contract, work they were doing when the suit was started, and lost under the express terms of the temporary injunction herein entered. The ultimate purpose of this suit is to make that injunction permanent. We submit that it would be laboring the obvious to argue further that the Brotherhood members "are or may be bound" by a judgment in this case within the meaning of Rule 24 (a) (2). Plaintiffs' protestations (Tr. 295) that such loss of work would be only "the incidental effect of the judgment" and that these employees might still recover damages against the River Road for breach of contract cannot alter the fact that these employees are specifically designated by plaintiffs as persons to be bound by the harshest of all injunctive remedies.

II.

The Motion to Affirm for Lack of Substantial Question Should Be Denied.

Plaintiffs in the alternative have moved to affirm the order denying the Brotherhood leave to intervene, because if the record shows that this court has jurisdiction, yet the questions involved "are so insubstantial as not to need further argument" (Tr. 300). However, plaintiffs direct no portion of their statement specifically to this point.

Substantial questions involved in this appeal are set forth in the Brotherhood's Jurisdictional Statement (Tr. 240-242). They include not only whether employees of a carrier are under Rules of Civil Procedure for District Courts entitled to be heard in a suit intended to nullify the employment contract between the employees and the carrier, but also the correct interpretation of a Federal statute

believed to establish the validity of such a contract (49 U. S. C. A. Sec. 5 (2) (f)) and of two Federal statutes believed to guarantee to employees the right to be heard (49 U. S. C. A. Sec. 17 (11) and 28 U. S. C. A. Sec. 45a).

Conclusion.

The Brotherhood urges that the plaintiffs' motion to dismiss the Brotherhood's appeal from the order denying leave to intervene or to affirm the order denying leave to intervene, should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

APPELLANT'S BRIEF.

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March 31, 1947.

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Appellant,

vs.

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Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

APPELLANT'S BRIEF.

JURISDICTION ON APPEAL.

Jurisdiction of the Supreme Court to entertain this appeal from the District Court order of November 7, 1946, denying intervention to appellant is based primarily on these two premises:

1. The order appealed from was entered in a suit

brought to enforce an order of the Interstate Commerce Commission, other than for the payment of money.

2. When interventon in such a suit is applied for as a matter of right, an order denying such intervention is final, and is appealable directly to the Supreme Court.

There appears to be no basis for dispute as to either of these primary jurisdictional elements. This is a suit for a mandatory injunction wherein plaintiffs assert violation of an order of the Interstate Commerce Commission relating to traffic and operating relationships (R. 3). Final orders entered by district courts in such cases are directly appealable to the Supreme Court under the statutory provisions hereinafter quoted. Where intervention is asserted as a matter of right, it is well settled that an order denying such intervention is final, and is thus appealable.

Missouri Kansas Pipe Line Company v. *United States,* 312 U. S. 502.

Alston Coal Company v. *Federal Power Commission,* 137 F. (2d) 740 (10th Cir. 1943).

Washington v. *United States,* 87 F. (2d) 421 (9th Cir. 1936).

Pertinent portions of the applicable statutes are as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

• • •

"(4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money." (Judicial Code Sec. 238, 28 U. S. C. A. Sec. 345)

"A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases * * * Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court." (Judicial Code, Sec. 210, 28 U. S. C. A. Sec. 47a)

"The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title . . . ." (28 U. S. C. A. Sec. 44)

We think it follows from the above that since this is a suit brought to enforce an order of the Interstate Commerce Commission other than for the payment of money, and intervention therein was asserted by appellant as of right and was denied, jurisdiction on appeal is clearly conferred on the Supreme Court by the statutory provisions above quoted.

However, certain appellees have moved to dismiss the appeal for lack of jurisdiction. The only ground for this motion is that the order appealed from is not a final, appealable order, and this ground is in turn *based solely on appellees' contention that appellant is not entitled to intervene as a matter of right in the district court.*

The sole question raised by a motion on this ground necessarily involves the merits of the appeal, since the only purpose of the appeal is to establish the exact opposite

of what the motion asserts. The only way this Court can pass on the ground stated in the motion to dismiss is to decide whether appellant should have been allowed to intervene as a matter of right, and that plainly constitutes a review of the order which decided the same point below. Therefore, if this Court decides that appellant should have been allowed to intervene as a matter of right, then the above stated basis for the motion to dismiss no longer exists, and this Court's jurisdiction to order a reversal is unchallenged. Moreover, when it is considered that the appellees have submitted to this Court a motion which is actually based on the correctness of the order appealed from, they have thereby admitted the power of this Court to review that order.

But the problem is the same whether it is approached from the standpoint of deciding the preliminary question of jurisdiction raised on the motion to dismiss, or the ultimate question of reversal or affirmance on the merits. If this Court decides that appellant should not have been allowed to intervene as a matter of right, then the trial court's order denying intervention will stand, and it makes little or no practical difference whether the form of the Supreme Court's order affirms the district court order or dismisses the appeal. The ultimate question involved on the merits of the appeal will have been passed on in either event.

We believe that when the application for intervention shows that it is made under Rule 24(a) of the Rules of Civil Procedure entitled, "Intervention of Right", that fact in itself should be enough to establish jurisdiction on appeal to review an order denying the application. Otherwise, in every such case the reviewing court is put in the anomalous position of holding that an order denying intervention of right is not appealable unless that order

is wrong, and it is only after the reviewing court has so determined that it acquires the jurisdiction to entertain the appeal. We submit that the Court is not required to back into the case in this manner, and that jurisdiction on appeal is shown, under the above statutes, from the very fact that the intervention was applied for as a matter of right and was denied. The points on which appellant relies for reversal will therefore be treated below under the heading Argument.

STATEMENT OF CASE.

The original plaintiffs are eight of the so-called "trunk-line" railroads which operate east and southeast from Chicago (R. 1-2). The Interstate Commerce Commission (herein called the Commission) was granted leave to intervene as an additional plaintiff (R. 47).

The defendant Chicago River and Indiana Railroad Company (herein called the River Road) operates a small but important switching railroad in the Chicago area (R. 56). Its holdings include all the tracks connecting the various trunk lines, including plaintiffs', with the Union Stock Yards at Chicago (R. 12-16). The defendant Chicago Junction Railway Company is the non-operating lessor of some of the River Road tracks (R. 51, 57). The defendant New York Central Railroad Company owns all of the capital stock of the River Road (R. 53). River Road employees are sometimes referred to in documents herein as "C. J. Crews" (R. 88).

The appellant, Brotherhood of Railroad Trainmen, an unincorporated association (herein called the Brotherhood), is the collective bargaining representative of railroad trainmen employed by the River Road (R. 55-56). The denial by the district court of its motion to intervene as a party defendant (R. 137) is the subject of this appeal (R. 148).

The essential dispute in the case is whether certain stock car movements on River Road tracks shall be handled by River Road power and crews or by the plaintiff carriers' power and crews (R. 10-11).

The disputed operations pertain to the switching and

spotting of stock cars incident to outbound shipments of livestock from the Chicago Stock Yards to various points outside Illinois (R. 54-55). Empty stock cars for these shipments are switched in from the trunk lines over River Road tracks, spotted at the loading chutes, and when loaded they are moved back over River Road tracks and switched to the trunk lines.

The River Road trainmen contend that under their contract with the River Road, they are entitled to do the yard work involved in both of these operations on River Road tracks, that is:

1. To switch and spot the empty cars for loading live-stock from points of interchange with the trunk lines on the River Road tracks to the loading chutes for loading.
2. After such cars have been loaded, to switch them from the loading chutes to the interchange points on the River Road tracks where they are to be picked up by the trunk lines (R. 90-92).

The River Road trainmen base their claim to this work, first, on their original collective bargaining agreement signed December 20, 1919, (R. 118) providing that they shall handle all "yard work" on their employer's line (R. 108-109) and second, on a "settlement interpretation" of this agreement dated January 23, 1946, specifically providing that they shall handle the switching and spotting of all outbound stock car movements (R. 88).

The "settlement interpretation" was made effective February 1, 1946, and thereafter all such movements, whether of hogs, sheep or cattle, were handled by the River Road power and crews (R. 55). Immediately prior to this time the River Road trainmen had been handling these movements as to hogs and sheep, but were not handling them as to beef cattle (R. 90-91). When the River Road power and crews took over this work as to all live stock,

the charges made by the River Road were collected from the various trunk lines at a previously established rate of $12.96 per outbound car as a division of the joint through rate (R. 54-55).

The plaintiff railroads brought this suit on February 12th, 1946 (R. 1). They complain of the above arrangement effected by the River Road pursuant to the settlement made with the Brotherhood. Plaintiff carriers contend that the above outbound movements (except in the case of hogs and sheep) should be carried out exclusively by them with their own power and crews over the tracks of the River Road, and that they should be allowed to use the River Road tracks for this purpose at the rate of $2.00 per car, that is, $1.00 for the empty and $1.00 for the loaded movement (R. 6-11).

Plaintiff carriers allege (R. 3) that the practice of allowing them to use River Road tracks with their own power and crews had been in effect on May 16, 1922, on which date a report and order was made by the Commission requiring continuance of the then existing "traffic and operating relationships" between the River Road and other carriers, and thus that the change effected on February 1 was in violation of this Commission order (R. 8).

The Commission order relied on by plaintiffs was entered in a proceeding had on the application of the New York Central, submitted in 1922, for approval of its plan to purchase all the stock of the River Road and for approval of a 99-year lease of Chicago Junction tracks to the River Road (R. 12). The above quoted phrase regarding "traffic and operating relationships" appears as a condition in the Commission report on which its order approving this purchase and lease is based. This condition reads as follows (R. 22):

> "3. The present traffic and operating relationships existing between the Junction and River Road and

all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

The report and order of the Commission do not specifically state whether the switching and spotting incident to outbound shipments of livestock were then handled by the trunk line power and crews, or by River Road or Chicago Junction power and crews. However, the report does state that each carrier "goes into the pens for outbound stock destined for its own line". The portion of the report which includes this phrase is as follows (R. 15):

> "The movement of live stock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic."

The above is the only part of the report bearing on the subject of outbound stock car movements. If a difference then existed in the "only practical method" of handling outbound movements of cattle, as against those involving hogs and sheep, the report made no mention of it.

Relying on the above order and report, plaintiff carriers seek a mandatory injunction against the River Road, the Chicago Junction, the New York Central, and all the employees of each of them, commanding them to permit plaintiff carriers to carry out the above described movements on River Road tracks, using plaintiffs' own power and crews. Plaintiff carriers also ask for a preliminary injunction, and damages for the alleged wrongful acts of the River Road (R. 10-11).

Neither the Brotherhood nor any of the employees it represents was named as a defendant, and no notice was

served on any of the employees referred to in plaintiffs' application for the preliminary injunction (R. 92).

On February 21, 1946 the Commission was granted leave to intervene as a party plaintiff (R. 47). Its intervening complaint also prayed for an injunction against alleged violation by defendant carriers and their employees of the Commission order of May 16, 1922 (R. 49).

On February 25, 1946 a stipulation of facts was filed (R. 50). It included a description of the above change in the method of handling outbound shipments of live stock other than hogs and sheep which took place on February 1, 1946. The stipulation also made mention of the fact that this change was effected as a result of a settlement between the River Road and the Brotherhood of a labor dispute over the work involved in these stock car movements (R. 55-56).

On March 14, 1946 the district court issued a preliminary injunction as prayed for by plaintiff carriers, commanding defendants and their employees to permit plaintiff carriers, with their own power and crews, to use the River Road tracks for outbound shipments of live stock other than hogs and sheep (R. 58-67). This injunction became effective March 15, 1946 (R. 67). The injunction order concluded as a matter of law that the labor dispute between the River Road and the Brotherhood, as described in the stipulation, was "irrelevant and immaterial" (Para. 10, R. 65).

On March 18, 1946, three days after the preliminary injunction became effective, the Brotherhood asked leave to file its special appearance for the purpose of moving to vacate the preliminary injunction and to dismiss the proceedings for failure to join indispensable parties (R. 67-72). This motion was denied on the next day, and the preliminary injunction was continued in effect.

On March 26, 1946 the Chicago Junction appealed from the order granting the preliminary injunction against it, and this order was reversed as to the Chicago Junction by the Circuit Court of Appeals, 7th Circuit, in *Baltimore & Ohio R. Co.* v. *Chicago Junction Ry. Co.*, 156 F. (2d) 357.

On May 6, 1946, the answer of the River Road was filed (R. 81-90). It stated that the handling of the movements in question was the subject of a dispute existing between it and the Brotherhood prior to January, 1946, the Brotherhood having contended that under their original employment contract, River Road employees were entitled to the work connected with the switching and spotting of all stock cars incidental to outbound movements of live stock over River Road tracks. The answer also states that until January 23, 1946 the River Road had resisted the demands of the Brotherhood for settlement of this grievance, but on that date, in order to avert a strike, it made an agreement with the Brotherhood, effective February 1, 1946, under which the Brotherhood members would do this work. The answer denies that this arrangement is violative of the Commission order of May 16, 1922 (R. 84).

On May 20, 1946 the Brotherhood filed its motion to intervene generally as a party defendant (R. 90-98). The Brotherhood's motion alleged that the primary purpose of the suit was to nullify the settlement interpretation of January 23, 1946, and to deprive the Brotherhood members of work they were performing thereunder, and that the Brotherhood members were therefore the real parties in interest as defendants, and as such, indispensable parties. The motion contended that the right to intervene is unconditionally conferred upon the Brotherhood by statute (49 USCA Sec. 17(11)). The motion also asserted intervention of right under Rules of Civil Procedure 24(a)(2), and set forth various reasons it was contended that the

interests of the Brotherhood in the suit were inadequately represented by the River Road, included among which was the failure of the River Road to assert the applicability of the Norris-LaGuardia Act as a defense to the action (R. 94-97). Attached to its motion to intervene was the Brotherhood's motion to vacate the preliminary injunction, to assess damages against plaintiffs and for summary judgment, this being the document the Brotherhood proposed to file if its motion to intervene were granted (R. 99-126). The motion to intervene was denied by order dated November 7, 1946 (R. 137).

On November 26, 1946 the Brotherhood asked leave to amend its motion to intervene (R. 138-140). The proposed amendment included an additional statute which the Brotherhood contended conferred upon the Brotherhood an unconditional right to intervene (28 USCA Sec. 45a). At the same time the Brotherhood also moved to vacate the order denying intervention. Both of these motions were denied on the same day (R. 138).

On January 6, 1947 the Brotherhood filed its petition in the district court to appeal from the order of November 7, 1946 denying intervention (R. 146), and the appeal was allowed by the district court on January 6, 1947 (R. 148).

On January 23, 1947 the plaintiff railroads moved to dismiss the appeal on the ground that this Court has no jurisdiction to entertain it, or in the alternative, that the order appealed from be affirmed. The ground stated in support of the motion to dismiss is that the order appealed from is not a final order and thus is not appealable because appellant was not entitled to intervene as a matter of right. The motion to affirm asserts lack of any substantial question involved on the appeal.

On March 3, 1947 this Court postponed further consideration of the question of jurisdiction to the hearing of this appeal on its merits (R. 163).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The assigned errors (R. 147-148) which the Brotherhood intends to urge are as follows:

1. The district court erred in denying intervention of right to the Brotherhood in that this suit seeks to enjoin Brotherhood members from working under a collective bargaining agreement made by the Brotherhood with their employer, wherefore the Brotherhood is an indispensable party to this suit, and has an absolute right to intervene.

2. The district court erred in denying intervention of right to the Brotherhood in that federal statutes, within the meaning of Rules of Civil Procedure 24(a)(1), confer an unconditional right to intervene on the Brotherhood, to-wit: the Interstate Commerce Act, Sec. 17(11) (49 USCA Sec. 17(11)) and the Judicial Code, Sections 212, 213 (28 USCA Sec. 45a).

3. The district court erred in denying intervention of right to the Brotherhood in that representation of the Brotherhood's interest by existing parties is or may be inadequate and the Brotherhood is or may be bound by a judgment in this action within the meaning of Rules of Civil Procedure 24(a)(2) providing for intervention of right.

SUMMARY OF ARGUMENT.

The district court erred in denying the Brotherhood's motion to intervene as a matter of right. Intervention should have been allowed on any one or more of the following grounds:

I. The Brotherhood Is An Indispensable Party.

This suit seeks to enforce plaintiff carriers' asserted right to use their own power and crews in switching and spotting outbound stock cars on River Road tracks. When this suit was brought, these movements were being handled by River Road power and crews under a contract between the River Road and the Brotherhood made after extended negotiations in which the Brotherhood prevailed in its insistence that this work be awarded to its members. This suit seeks to establish that performance by the River Road and the Brotherhood members of this part of their employment contract should be enjoined as violative of a Commission order. The relief prayed for cannot be granted without an adjudication of the rights of the Brotherhood members under their employment contract. The Brotherhood members are therefore the real parties in interest as defendants; they are indispensable parties, and the Brotherhood, as their representative, has an absolute right to intervene.

II. Federal Statutes Give the Brotherhood an Unconditional Right to Intervene Within the Meaning of Rules of Civil Procedure 24 (a) (1).

(A) The Interstate Commerce Act, under which this suit was brought, provides that the duly designated representatives of employees of a carrier "may intervene and be heard" in any proceeding under the Act "affecting such employees" (49 USCA Sec. 17 (11)). The Brotherhood is admittedly the qualified representative of River Road employees, and since direct injunctive relief is sought against River Road employees, there is no question but that this is a proceeding which affects such employees. This statute therefore confers an unconditional right of intervention of the Brotherhood.

(B) The Judicial Code provides that associations "interested" in a suit relating to action of the Interstate Commerce Commission "may intervene in said suit . . . at any time after the institution thereof" (28 USCA Sec. 45a). This suit relates to action of the Interstate Commerce Commission, and the Brotherhood is an association which is unquestionably "interested" in the suit within the meaning of this statutory provision. The Brotherhood is therefore entitled to intervene as a matter of right under this statute.

III. The Brotherhood Is Entitled to Intervention of Right Under Rules of Civil Procedure 24(a) (2).

This rule guarantees intervention of right to an applicant who "is or may be bound by a judgment in the action", and whose interest "is or may be" inadequately represented by existing parties. The Brotherhood members, as employees of the River Road, are expressly bound in this suit by the preliminary injunction already issued, and will be similarly bound if the injunction is made per-

manent. The River Road, which is the only existing party which might have undertaken to represent the Brotherhood's interest, has avowed that it feels no such duty, and that it may have interests adverse to the Brotherhood. The River Road considers its contract with the Brotherhood to be onerous, and the River Road is therefore not the proper party to champion the defense of that contract. Inadequacies in the defense provided by the River Road include its failure, in view of the labor dispute involved, to urge the applicability of the Norris-LaGuardia Act so as to prevent the issuance of an injunction and to require dismissal of the suit.

ARGUMENT.

I. The Brotherhood Is An Indispensable Party.

The absence of the Brotherhood or its members as indispensable parties was invited to the district court's attention before the preliminary injunction was issued. The court evidently felt that it would be proper to issue the injunction against the Brotherhood members first, and decide later at the hearing on the permanent injunction whether they were indispensable parties (R. 77). This was done on the theory that if the Brotherhood or its members later proved to be indispensable parties, the injunction would be a nullity as to them and they would then know that they could have ignored it with impunity from the beginning (R. 74). If, during the pendency of the decision on indispensability, the Brotherhood members obeyed the injunction through groundless fear of its validity and consequent binding effect upon them, they would have only themselves to blame for giving such undue respect to the court's order. They were reassured in this regard by the trial judge as follows:

> "If you are indispensable parties any order the court might make would be void in any event. You don't need to give the matter a second thought" (R. 134).

Compare *United States* v. *United Mineworkers of America*, (L. ed. Advance Opinions, 91 L. ed. 595).

The familiar general rules as to whether the interest of an absent person is such as to make him an indispensable party may be summarized as follows:

1. He is an indispensable party if the suit involves a direct adjudication upon his rights.

2. He is an indispensable party if his interest is not distinct and severable from that of the named parties.

3. He is an indispensable party if, in his absence, the court cannot render justice between the parties before it.

4. He is an indispensable party if the final decree will have an injurious effect upon his interest.

5. He is an indispensable party if a final decree, even though it does not affect his interest, will leave the controversy in such condition that its final determination is wholly inconsistent with equity and good conscience.

Rule 19, Rules of Civil Procedure.

Mallow v. *Hinde*, 25 U. S. 116.

Shields v. *Barrow*, 17 How. 130.

Niles-Bement-Pond Company v. *Iron Moulders Union*, 254 U. S. 77.

Washington v. *United States*, 87 F. (2d) 421 (9th Cir. 1936).

Chicago, Milwaukee & St. Paul Railroad v. *Adams County*, 72 F. (2d) 816 (9th Cir. 1934).

The facts bearing on indispensability of the Brotherhood as a party, all of them readily available to the district court at the outset, may be re-stated briefly as follows:

A labor dispute of long standing between the Brotherhood and the River Road over the handling of outbound stock car movements on River Road tracks was settled through collective bargaining on January 23, 1946. The settlement was in the Brotherhood's favor in that its demand for the right to do this work was recognized, effective February 1, 1946 (R. 86). The settlement meant that other carriers, while they were using River Road tracks for outbound stock cars, would be required to allow River Road power and crews to switch and spot such cars begin-

ning February 1, 1946. This suit followed twelve days later. Plaintiffs challenged the legality of the car handling provided under the settlement on the ground that it was violative of a Commission order requiring continuance of traffic and operating relationships as they existed in 1922 between plaintiffs and the River Road. Plaintiffs asked the court to use its injunctive power to take this work away from the River Road employees. The River Road was named as a defendant, but not the Brotherhood or any of its members.

This was the situation presented to the district court on the application for a preliminary injunction. We think it might have occurred to the court, on its own initiative, that the real parties in interest, *i.e.*, the principal parties who would be adversely affected by the proposed injunction, were not in court. This was evidenced at the very beginning from the fact that the principal named defendant, the River Road, was pointing to the labor dispute between it and its employees and the danger of a strike in connection therewith to explain its part in the acts complained of, and yet was not opposing the injunction on the obvious ground that the requirements of the Norris-LaGuardia Act had not been met by plaintiffs. This should have made it reasonably clear that the River Road, as a reluctant party to a collective bargaining agreement with its employees, would not consider itself adversely affected by an injunction relieving it from performance of the agreement, so long as the employees in favor of whom the agreement was made were also enjoined.

We think the court might easily have perceived, from this situation, that the proceeding should be dismissed on the court's own motion unless the employees sought to be enjoined were named as parties defendant. Authority for

this action is clearly stated in *Minnesota* v. *Northern Securities Company*, 184 U. S. 199 (at page 235):

> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by counsel."

No extensive discussion of the authorities is necessary to demonstrate that the Brotherhood is an indispensable party. It is manifest that the Brotherhood members have a property right of their own in the work awarded to them under their employment contract. Acts done in performance of that contract obviously prompted this suit, brought to enjoin performance both by employer and employee. It would be pure sophistry to say that the interests of the employer and the employees under this contract are identical or so nearly alike that the employees cannot be recognized as a separate legal entity. To say that employees of a corporate employer are like its officers, agents and representatives, and can be recognized only as appendages of the corporate body with no separate existence of their own is not only unrealistic; it is contrary to the basic legal concept of present day employer-employee relationships. Collective bargaining agreements are bilateral contracts both in form and substance, and the fact that they shall be made with employer and employee at arm's length is a fundamental principle of present labor laws. The provisions of the Interstate Commerce Act which specifically recognize employees as having justiciable rights of their own regarding their employment apart from their employer will be discussed in the next section of this brief.

It has been explicitly held that when an injunction is

sought against a carrier employer and its employees regarding the handling of freight, the naming of employees as persons sought to be enjoined gives the labor union representing such employees an absolute right to intervene, and that in some instances the labor union may actually be the real party in interest. *International Brotherhood* v. *Keystone Freight Lines*, 123 F. (2d) 326 (10th Cir. 1941).

We submit that no matter what test of indispensability is applied, the fact that direct injunctive relief is sought against the River Road employees is of itself sufficient proof that the interest of the Brotherhood, as their representative, is such that the Brotherhood is an indispensable party. When we add to this the fact that the relief sought would inevitably nullify provisions in a contract on which certain employment of Brotherhood members specifically depends, and would condemn the work done by them thereunder as illegal, it would be impossible to devise a test of indispensability which could exclude them without violating the constitutional guarantee of due process.

In this case the district court took upon itself the grave responsibility of using its injunctive power to order men off their work in a proceeding to which they were not parties, without serving notice on them or giving them an opportunity to be heard, and without determining whether these men were indispensable parties to the proceeding. If this was not in itself an abuse of judicial power, then surely, after the order was entered, the minimum duty which devolved upon the district court was to permit the absent parties affected to enter the suit so that they might protest against the injunction. The injunction against these men has now been in effect for more than a year, and they have yet to be given their day in court to defend their right to work.

II. Federal Statutes Give the Brotherhood an Unconditional Right to Intervene Within the Meaning of Rules of Civil Procedure 24 (a) (1).

Quite apart from the status of the Brotherhood as an indispensable party seeking intervention, its right to intervene is unconditionally provided by two federal statutes. Rule 24 (a) (1) of the Rules of Civil Procedure specifically directs allowance of a timely application to intervene when intervention is provided by federal statute. The rule is as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; . . . ."

A. *The Interstate Commerce Act Confers the Right of Intervention on the Brotherhood.*

The first statutory provision requiring allowance of the Brotherhood's motion to intervene is in the Interstate Commerce Act itself, the Act under which the complaint alleges this suit was brought. Section 17 (11) of the Act (49 USCA Chap. 1, Sec. 17 (11)) provides as follows:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

We note at the outset that this provision distinctly recognizes that employees of a carrier may have interests of their own as such employees which are entitled to a representation that is separate and apart from their employer. An applicant's absolute right to intervene is plainly established under this provision when it shows (1) that it is the duly designated representative of carrier employees, (2) that the proceeding affects such employees, and (3) that the proceeding arises under the Interstate Commerce Act.

That the Brotherhood is the duly designated representative of trainmen employees of the River Road was not disputed. That this suit affects such employees, although not granted in so many words by plaintiffs, was in effect conceded by them when their counsel said (R. 133):

> "If you do not enjoin the individuals the order miscarries * * *."

The only other question raised in the district court under this statutory provision was whether the above phrase "any proceeding arising under this chapter" applies to the instant suit, brought under Section 16 of Chapter 1, in view of the heading of Section 17 of Chapter 1 (49 USCA Sec. 17):

> "Commission procedure; Delegation of Duties, Rehearings * * *"

It was contended by plaintiffs (R. 132) that this means intervention is provided only in Commission proceedings, and that the phrase "any proceeding arising under this chapter" as found in the body of the statute should therefore be interpreted as if it read "any proceeding before the Commission arising under this section."

Such an argument begins, of course, with the assumption that the phrase in question does not mean what it says. It assumes that the sub-title requires that new words be added to restrict the plain and literal meaning of the words employed in the body of the statute.

This Court has long since rejected such an approach. In *United States* v. *Fisher*, 2 Cranch 358, Chief Justice Marshall said (at 386):

> "Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction."

Plaintiffs argued that the word "proceeding" as used in this provision has too narrow a connotation to refer both to Commission proceedings and court proceedings. A complete answer to this contention can be found by looking no further than the heading of paragraph 12 in the preceding section of the same Act, the paragraph under which plaintiffs say in their complaint this suit was brought. It reads as follows:

> *"Proceedings to enforce orders other than for payment of money."* (49 USCA Sec. 16(12))

We think it is manifest that the plain meaning of Section 17(11) requires allowance of the Brotherhood's application for intervention of right, and that the construction adopted by the district court in denying intervention not only tortures the words of the statute, but in so doing arrives at the patently inconsistent and unreasonable conclusion that the representative of railroad employees should be allowed to intervene before an administrative agency in a proceeding affecting them, but not before a court in a proceeding wherein they are faced with an injunction.

B. *The Judicial Code Confers the Right of Intervention on the Brotherhood.*

The second statutory provision requiring allowance of the Brotherhood's application to intervene is found in the Judicial Code, Sec. 212, 213 (28 USCA Sec. 45a), the pertinent portion of which is as follows:

> "The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title * * * *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any

suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further,* That communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; . . . ."

This section plainly requires allowance of intervention to an association "interested" in any suit governed by Section 44 "relating to action of the Interstate Commerce Commission." Section 44, as already pointed out, governs the procedure in district courts "in respect to cases for the enforcement . . . of any order of the Interstate Commerce Commission other than for the payment of money." Nothing could be clearer than that this provision applies to the instant suit, and confers the right of intervention on the Brotherhood if it can be identified as an "interested" association. We submit that the plaintiffs themselves furnished such identification by naming River Road employees as persons who should be enjoined. If this statute requires the showing of a greater interest than that the applicant association's members are to be enjoined in the suit from doing work awarded them under a collective bargaining agreement, then this statute is not one intended to allow intervention, but to deny it. Compare: *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113; *Kansas City Southern Ry. Co.* v. *U. S.*, 282 U. S. 760; *Boston Tow Boat Co* v. *U. S.*, 321 U. S. 632.

Even if this suit had not sought direct injunctive relief against employees, the Interstate Commerce Act identifies the Brotherhood as "interested," by virtue of its collective bargaining agreement, no matter what interpretation is put on the Commission order which plaintiffs say is in conflict with the Brotherhood's agreement. Section 5(2)(f) of the Act (49 USCA 5(2)(f)) provides, in part, as follows:

> "* * * Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The trial judge held that the provision for intervention in the Judicial Code was unavailing to the Brotherhood. The reasons for his holding were stated by him before the plaintiffs could advance their argument that the Brotherhood is not "interested" in the suit within the meaning of this statute (R. 144). Referring to Sections 44 and 45a (28 USCA), the judge said (R. 143-144):

> "The right of intervention, if there is any such thing as an absolute right of intervention, would have to come under the Commerce Act, and it does not come there. The matters you have referred to, in my judgment, refer to proceedings before the Commerce Commission where some order of the Commission tries to affect those rights of outside parties, such as a labor union or a city or a village or some other group of individuals. In my judgment it does not apply to cases in court."

Here we find a holding that Section 44, which by its terms governs "procedure in district courts" in cases for enforcement of Commission orders, and Section 45a, which by its terms provides for intervention in "any suit" relating to action of the Commission, should nevertheless be

construed so as to apply only to proceedings before the Commission, and not to cases in court. In short, this is a holding that the Judicial Code does not apply to the judiciary.

III. The Brotherhood Is Entitled to Intervention of Right Under Rules of Civil Procedure 24(a) (2).

Rule 24(a)(2) of the Rules of Civil Procedure is as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ."

This provision for intervention of right clearly applies to the Brotherhood's application if River Road trainmen are or may be bound by the injunction sought, and the interest of the trainmen is or may be inadequately represented by the named defendants. The preliminary injunction already issued against the Brotherhood members, which plaintiffs are seeking to have made permanent, more than satisfies the requirement that the applicant is or may be bound by a judgment in the action.

We think it should be equally clear, from the very nature of the case, that the Brotherhood's interest in this suit is not adequately represented by the named defendants. The River Road, as employer of Brotherhood members, is the only party to be considered in this connection, and it has emphatically stated not only that it feels no duty to represent the Brotherhood, but that it recognizes that River Road interests may actually be adverse to the Brotherhood (R. 127). The obvious truth is that the River Road never had any appetite for the settlement agreement of January 23, 1946, and made that agreement with the Brotherhood

only in the face of an almost unanimous strike vote by Brotherhood members (R. 85). It would be surprising indeed if the River Road, as the reluctant party to a contract being attacked by others as unlawful, should zealously defend its unpleasant duty of performing it. The gravest danger to the River Road in the suit was not that its performance of the contract would be enjoined, but that the Brotherhood members might be excepted from the restraining effect of the injunction. This is the only logical inference to be drawn from the fact that it was the River Road, in the first instance, which invited the trial judge's attention to the absence of the Brotherhood as an indispensable party, and yet made no motion to dismiss for failure to join an indispensable party. Nevertheless, when the Brotherhood asked leave to file a special appearance for the purpose of moving to dismiss the proceeding on this same ground, the River Road strenuously objected. Mr. Murray, attorney for the River Road, insisted that the appearance of the Brotherhood be made generally or not at all (R. 75, 77). The district judge affirmed this stand taken by the River Road as follows (R. 79):

> "I will not have a special appearance around here or any *amicus curiae*. People coming in will come in with both feet, and get their feet wet."

As already suggested, the River Road offered no defense to the injunction on the ground that the suit involved or grew out of a labor dispute, and that the court therefore had no jurisdiction, under the Norris-LaGuardia Act (29 USCA Sec. 101-115), to issue the injunction. Plaintiffs' complaint does not even purport to make out a case for an injunction under this Act, and the application of its provisions to this suit would clearly require dismissal insofar as an injunction is sought.

It is unthinkable that an adequate representation of the Brotherhood's interest would not include at least a citing

of the Norris-LaGuardia Act and pertinent decisions thereunder in defense against the injunction. A case directly in point is *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 Fed. (2d) 931 (10th Cir. 1942), certiorari denied in 317 U. S. 645. That was a suit under the motor carrier provisions of the Interstate Commerce Act, brought by a motor carrier against other such carriers for an injunction to compel the defendant carriers to resume former traffic relationships with plaintiff. The plaintiff was having labor difficulties, and its property was being picketed. Defendant carriers, pursuant to bargaining agreements with their own employees, had refused to handle traffic for plaintiff under such conditions. The reasoning and conclusion of the Court of Appeals as to the applicability of the Norris-LaGuardia Act in this situation was as follows (at 933):

> "Disturbance of the relationship between defendants and their employees was threatened. A strike of such employees with the resulting injury to the businesses of defendants was in the immediate offing. It could be avoided only by settlement of the controversy between plaintiff and the unions, or by defendants terminating their traffic relations with plaintiff. The labor dispute originating between plaintiff and the unions thus projected itself into the relationship between defendants and their employees. Clearly the subject matter of plaintiff's action involved and grew out of a labor dispute, within the intent and meaning of the act. • • •
>
> "The Motor Carrier Act, *supra*, places upon a common carrier of freight in interstate commerce certain duties and responsibilities toward the public, and ordinarily such duties and responsibilities are paramount to private rights. But whatever other remedies may or may not be available, *there is nothing in the exactions of the Motor Carrier Act which operates to enlarge beyond the limitations of the Norris-LaGuardia Act the jurisdiction of a United States Court in re-*

spect to the issuance of a restraining order or a temporary or permanent injunction in a controversy involving or growing out of a labor dispute.

"The judgment is reversed and the cause remanded with direction to dismiss the action." (Emphasis added.)

This case squarely holds that the broad definition in the Norris-LaGuardia Act of a suit growing out of or involving a labor dispute includes a situation wherein the relationships between a defendant and its employees will necessarily be affected by the relief sought in the suit, even though there is no open breach in those relationships at the time the suit is instituted. Thus in our case, a labor dispute between the River Road and its employees is clearly involved when the plaintiffs seek use of the injunctive weapon to reopen a dispute which was barely settled when the suit began. Moreover, this suit obviously grew out of the labor dispute settlement of January 23, 1946.

We do not intend to suggest that the River Road merely overlooked the obviously strong defense against the injunction available to it under the Norris-LaGuardia Act and the *Lee Way* case, and was thereby inept in its representation of the employees' interest. It is a matter of record that the River Road's counsel considered both the act and the case, "but were not persuaded (*sic*) that they were applicable or decisive of any issues involved in this suit" (R. 129). The *Lee Way* case and other authorities decided under the Norris-LaGuardia Act establish that the limitation placed by the Act on the power of federal courts to issue injunctions in suits involving or growing out of labor disputes applies to suits for injunction brought under the Interstate Commerce Act or any other statute or rule providing for issuance of injunctions. Rules of Civil Procedure 65(e); *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad Co.*, 321 U. S. 50; *Southeastern Motor*

Lines, Inc. v. *Hoover Truck Co., Inc., et al.*, 34 F. Supp. 390 (D. C. Tenn., 1940).

In addition to the Norris-LaGuardia Act and authorities thereunder, another highly important decision also falls into the category of the cases which the River Road was not "persuaded" even to cite in defense of this action. It is *Gulf, Mobile & Northern Railroad Company* v. *Illinois Central Railroad Company*, 21 F. Supp. 282 (D. C., Tenn., 1937, appeal dismissed by stipulation in 109 F. (2d) 1016). In that case the court considered a factual situation much similar to the present one from the standpoint of the meaning and legal effect of an Interstate Commerce Commission order, and is worthy of consideration in some detail.

In the *Gulf* case plaintiff railroad filed an application with the Interstate Commerce Commission requesting its approval of a proposed agreement between the plaintiff and defendant railroads by which the plaintiff would acquire the right to operate its trains over the tracks of the defendant, such trains to be drawn by the plaintiff's own engines and in charge of the plaintiff's own employees. The report of the Commission made specific reference to the proposed agreement and to the fact that the plaintiff's trains were to be drawn by its own engines and in charge of its own employees. The order of the Commission, issued on May 20, 1933, expressly referred to and made the report of the Commission a part of the order. The order of the Commission directed a certificate of public convenience and necessity to be issued effective June 7, 1933, with respect to the trackage rights involved. The two railroads then executed the proposed agreement.

Thereafter representatives of the employees of the defendant railroad claimed that they were entitled to operate the trains of the plaintiff while exercising its trackage rights over the lines of the defendant for the reason that such employees had an agreement with the defendant rail-

road entitling them to man all trains operating over the defendant's tracks. The employees of the defendant threatened to strike unless such work were given to them. Thereupon the defendant notified the plaintiff that it would use the defendant's employees in the operation of the plaintiff's trains over the tracks of the defendant railroad. The plaintiff filed suit on the ground that the order of the Interstate Commerce Commission of May 20, 1933, with respect to the trackage rights involved, entitled the plaintiff to an injunction restraining the defendants from interference with the operation of its trains pursuant to the terms of the contract entered into in accordance with the order of the Interstate Commerce Commission.

After reviewing the above facts, the court, in an exhaustively annotated opinion, decided that plaintiff was not entitled to an injunction requiring that it be permitted to use defendant's tracks with plaintiff's own crews. The court particularly noted that the Commission report had mentioned use of plaintiff's own crews while operating on defendant's tracks. Portions of the opinion follow (beginning at 289):

> "It is, therefore, necessary to consider and weigh the authorities to determine whether under all circumstances it must be implied that, because the Interstate Commerce Commission issued a certificate of public convenience and necessity to one railroad to operate its trains over the tracks of another, pursuant to a contract which provided that it would use its own train crews, the licensee railroad received, without express mandate from the Commission, an order, enforceable in a United States court by the extraordinary processes of injunction and specific performance, to use its own employees regardless of intervening public interest in the avoidance of a strike.
>
> "(2) The Supreme Court has distinctly held that the lack of express finding by the Interstate Commerce Commission may not be supplied by implication. *Atchi-*

son, Topeka & Santa Fe R. R. Co. v. *United States*, 295 U. S. 193, 55 S. Ct. 748, 79 L. Ed. 1382, decided April 29, 1935. * * *

"It is believed, from study of the cases, that unwarranted implication would be required to find that the order of the Interstate Commerce Commission here involved embraced an unchallengeable conclusion that the public convenience and necessity demanded the operation of plaintiff's trains over defendant's tracks by the former's employees.

"(3) Even if the Interstate Commerce Commission intended by its order to determine finally the right of the plaintiff to use its own employees in operating trains over defendant's tracks, would the Commission have jurisdiction and power to do so? The conclusion has been reached that it would not.

"Nowhere in the statutes of the United States is the Interstate Commerce Commission given jurisdiction over labor controversies. The Railway Labor Act provides the means for governmental mediation of disputes growing out of the working conditions of railroad employees, but the statute does not compel arbitrament. Act May 20, 1926, c. 347, Sec. 2, 44 Stat. 577, as amended by Act June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186 (45 U. S. C. A. Sec. 151a). How, then, can any implication be drawn from the provisions of the Interstate Commerce Act that the issuance of an order beyond the jurisdiction of the Commission can attain such sanctity as to become enforceable by mandatory processes of United States courts, with the resultant effect that vital interests of organized labor become foreclosed thereby unless redeemed by the successful outcome of unwilling arbitration or by the economic force of a strike? * * *

"(4) From insistence that the Interstate Commerce Act places a mandatory duty upon the courts to enforce obedience to the orders of the Commission, counsel for plaintiff deduce that this court is compelled to grant the mandatory injunction prayed and to decree specific performance of the contract in all of its terms.

"*Central New England Ry. Co.* v. *Boston & Albany R. R. Co.*, 279 U. S. 415, 49 S. Ct. 358, 73 L. Ed. 770, answers the argument of the plaintiff. The case involved the effect of an order of the Interstate Commerce Commission which it was contended relieved a carrier of its obligation to make further payment under a trackage agreement. In holding to the contrary, the Supreme Court pointed out that the certificate of the Commission certified only that public convenience and necessity permitted the abandonment of the trackage and that the petitioner was authorized to abandon it; and that the respondent 'whose rights were vitally affected by the order' was not notified of the proceeding before the Commission, nor a party to it. The court said (279 U. S. 415, 419, 421, 49 S. Ct. 358, 359, 73 L. Ed. 770): 'Even if the broad purposes ascribed to the Act be assumed, it is not to be supposed that the Commission intended to do more than was stated in its order. * * * Respondent does not ask that the order be set aside or that it be regarded as illegal and void; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by petitioner, of annulling the contract. The question is merely one of the legal effect of the order.'

"In *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023, it was held that an order of the Interstate Commerce Commission disapproving reduced rates proposed by a carrier is void, unless supported by findings of the basis or quasi jurisdictional facts conditioning the power of the Commission. With reference to the report of the Commission, Mr. Justice Cardozo said (294 U. S. 499, 510, 511, 55 S. Ct. 462, 467, 79 L. Ed. 1023): 'The difficulty is that it (the Commission) has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting

inferences. Something more precise is requisite in the quasi jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221; *Florida* v. *United States*, 282 U. S. 194, 215, 51 S. Ct. 119, 75 L. Ed. 291. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'

"See, also, *Interstate Commerce Commission* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280.

"Upon the principles of the three last-cited cases and of other authorities discussed earlier in this opinion, it is manifest that no duty has been imposed upon this court to adjudge contrary to its own interpretation of the scope, meaning, and effect of an order of the Interstate Commerce Commission. * * *"

One of the basic principles followed in the *Gulf* case, *i.e.*, that Interstate Commerce Commission orders should not be construed so as to nullify the right of railroad employees to better their position through collective bargaining, was the subject of an amendment added in 1940 to the Interstate Commerce Act (49 U. S. C. A. Sec. (5) (2) (f)), quoted *supra*, by which it was provided that "notwithstanding any other provisions" of the Act, an agreement pertaining to the protection of employees may be "hereafter" made by the railroad with the representative of its employees. We think the *Gulf* case ought to have been cited as part of an adequate defense of the employees' interest.

Proper application of the above stated principle to our case clearly necessitates careful inquiry into the exact provisions of the Commission order of 1922, the report on which it is based, and the actual "traffic and operating relationships" then existing between the River Road and

other carriers with respect to the disputed freight movements. Such an inquiry would have disclosed that numerous matters were not specifically covered by the Commission order and report of 1922, such as whether foreign crews had theretofore been handling switching and spotting of all stock cars incident to outbound movements on River Road tracks. It would also disclose whether a distinction was intended to be made in the handling of cattle movements, as compared with those involving hogs and sheep. And most important of all, the inquiry would show what employer-employee relationships, contractual or otherwise, had existed with reference to these matters between the carriers involved and their employees, and especially between the River Road and its employees. This subject would necessarily include all factors bearing on the question whether the Commission, in passing on an application for approval of the purchase of stock and the making of a lease, intended to cut off all collective bargaining rights of employees of the carriers involved. The matter of notice to such employees might well be investigated to throw light on this question. Without complete information on at least these subjects, the court was obviously in no position even to determine whether there was any real conflict to be reconciled between the Commission order and the Brotherhood's employment contract, much less whether the performance of the employment contract constituted a violation of the order which should be enjoined.

Under the defense offered by the River Road, no answer was filed denying plaintiffs' charge that performance of the settlement agreement constituted a violation of the Commission order until more than two months after the preliminary injunction was issued. The record convincingly indicates that the court started off, so far as the Brother-

hood was concerned, by assuming that violation of the Commission order was a proved fact, and that anything said to the contrary amounted to a wholly unwarranted attack on the order itself and could not even be considered (R. 76). We acknowledge that if this theory were correct, any defense at all would be more than adequate—it would be an extravagance.

We note that the trial judge, as late as the time he was allowing this appeal, did not believe that the point of inadequacy of representation was involved in an application for intervention of right under Rule 24(a)(2) of the Rules of Civil Procedure. The view of the trial judge was expressed as follows (R. 155):

> "If it were a matter of discretion I would have denied it because there was no showing the parties seeking to intervene were not properly represented by other parties of record, but I passed on it as a question of right."

Conclusion.

The application of the Brotherhood to intervene, as a matter of right, should have been granted on each of these grounds:

The Brotherhood is an indispensable party;

Federal statutes confer upon the Brotherhood an unconditional right to intervene;

The employees represented by the Brotherhood are or may be bound by a judgment in the action, and the representation of their interest by existing parties is or may be inadequate.

Intervention of right is required on any one or more of the above grounds, all of which should have been sustained,

and the motion to intervene should have been allowed. The order denying intervention should be reversed.

Respectfully submitted,

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March 31, 1947.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
AN UNINCORPORATED ASSOCIATION,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,
Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

APPELLANT'S REPLY BRIEF.

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Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

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Defendants-Appellees.

ON APPEAL FROM THE DISTPICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

REPLY TO PLAINTIFFS' STATEMENT OF THE CASE.

Plaintiffs in their brief, page 3, characterize our Statement of the Case as "incomplete, misleading and wholly inadequate" to an understanding of the questions raised

by the appeal. Then follows fifteen pages of Statement of the Case with facts purporting to be shown in various court documents on file (Br. 3-17). It would serve no purpose here to review our Statement of the Case, inasmuch as plaintiffs point to no inaccuracy therein, and do not state wherein our statement is incomplete, misleading or inadequate. We shall merely mention here, as briefly as possible, certain incorrect statements made by plaintiffs.

On page 6 of their brief, plaintiffs state that from 1922 to the present time the New York Central has had "control of the traffic and operating relationships existing between the Junction and the River Road on the one hand, and the plaintiffs, respectively, on the other hand." This statement was taken from paragraph 12 of plaintiffs' complaint (R. 6).

On page 8 of their brief, plaintiffs state that the Stipulation of Facts (R. 50-55) admitted as true the "facts above outlined" by plaintiffs from the allegations of the complaint.

This is not correct. The allegation of plaintiffs as to control by the New York Central of traffic and operating relationships is categorically denied by the Central and the River Road in their answer (R. 82, 84), and as to the Junction, the stipulation merely states it has had no traffic or operating relationships whatever since 1922 (R. 57).

The materiality of this point of fact is obvious at a trial on the merits, since the condition in the Commission order sued on only required continuance of such traffic and operating relations as were within the control of the New York Central (R. 53). If plaintiffs wish to argue, as a conclusion of law, that such traffic and operating control follows stock ownership, of course they may do so. But

plaintiffs should not describe their contention as a stipulated fact. So far as this appeal is concerned, we doubt its materiality, and we have not noted any further reference to the matter by plaintiffs.

Also on page 6 of plaintiffs' brief, it is stated that the report of the Commission accompanying its order of May 16, 1922 referred to the practice of allowing plaintiffs to use River Road tracks with their own power "and crews", as the only practical method of handling livestock other than hogs and sheep. As we previously pointed out at page 3 of our brief in opposition to the motion of plaintiffs to dismiss, the paragraph of the report referred to by plaintiffs mentioned only the "own power" of plaintiffs, and not their "own power and crews" (R. 15). We have also pointed out that the Commission report makes no distinction between cattle on the one hand, and hogs and sheep on the other (Appellant's brief, page 9; R. 15).

On page 9 of plaintiffs' statement of facts it is declared that the preliminary injunction which was issued in this case followed substantially in form and scope the provisions of Rule 65 (d) of the Rules of Civil Procedure. This is argumentative and has no place in a statements of facts. It cannot be taken as an answer to our argument (Appellant's brief, page 30) that Rule 65 (e) makes Rule 65 (d) inapplicable to statutory provisions relating to injunctions in "actions affecting employer and employee."

On page 16 of their brief, plaintiffs state that the Brotherhood in its motion to intervene charged that the defendants "made no formal objection" to the preliminary injunction. The fact is the precise opposite. The Brotherhood charged that the defendants made *only* formal objection to the injunction (R. 96).

In view of plaintiffs' above inaccuracies and their failure to point out any error or omission in our Statement

of the Case, we feel justified in concluding that it is adequate for purposes of this appeal.

Priority in Time as Between Collective Bargaining Agreement and Commission Order.

The relative dates of the collective bargaining agreement between the River Road and its trainmen (Chicago Memorandum of Agreement) and the order of the Interstate Commerce Commission which is sued on are important only because plaintiffs have laid such great stress (Br. 26-35) on their contention that the order came first and that the agreement therefore must fall.

Our position is that the contract is not violative of the order; that regardless of when the contract was made it establishes an interest of the employees in the subject matter of this suit; and that under Section 5 (2) (f) (effective in 1940) of the Interstate Commerce Act, pertaining to transactions between carriers requiring Commission approval, it is expressly provided that an agreement pertaining to the protection of the interests of employees "may hereafter" be made by a carrier and its employees. This provision is effective "notwithstanding any other provision" of the Act, and it clearly authorizes the settlement interpretation of the Chicago Memorandum of Agreement, made January 23, 1946, irrespective of the date when either was made in relation to the Commission order.

However, since the plaintiffs insist that the facts in the record support their contention that the Commission order of May 16, 1922 antedated the collective bargaining agreement, and have contended that the latter did not come into existence between the River Road and its trainmen until some unspecified time after October 1, 1937 (Br. 14-16), we feel that a discussion of this purely factual point is warranted.

The collective bargaining agreement under which the employees worked (R. 103) is entitled "The Chicago Memorandum of Agreement" (R. 106). Among the nineteen railroads represented in the Agreement was "Chicago Junction Railroad" (R. 106). The Agreement was to remain in effect until revised or abrogated (R. 116). The Agreement was signed for the Brotherhood of Railroad Trainmen on December 20, 1919 and was to become effective as to some rules in 1919 and as to the remaining rules in 1920 (R. 118, 124).

Prior to May 19, 1922 the Junction operated a switching road "in conjunction with a connecting switching line owned and operated by the River Road" (R. 56). When the River Road leased the Junction properties on May 19, 1922 the River Road "took over the personnel of the Junction, except a few of its officers, and since that time the said properties so leased have been operated solely by the River Road under the name and caption of 'Chicago Junction Railway, Chicago River and Indiana Railroad Company, Lessee'" (R. 56, 57). The Junction has never operated its properties since May 19, 1922, and its entire personnel consists of three officers (R. 57). In its report of May 16, 1922 the Commission recited that for the purpose of switching charges, "the Junction and River Road shall *continue to be treated as a single line to the same extent as at present*" (emphasis supplied) (R. 22). The collective bargaining agreement to which the Brotherhood and the River Road were parties was the Chicago Memorandum of Agreement (R. 85).

In the relations between the River Road and its employees the carrier was sometimes described as "Chicago Junction Railway (C. R. I. R. R. Co. Lessee)" (R. 90). A representative of the employees referred to it in the present proceedings as "Chicago River and Indiana Rail-

road Company, lessee of the Chicago Junction Railway Company" (R. 70).

The following language appears in Article 1 of the Chicago Memorandum of Agreement (R. 107):

> "Note—Revised rates of pay, effective October 1, 1937, and rate of pay for car retarder operator added to original agreement."

Other notes concerning revisions as to rates of pay effective in 1926 and 1927 appear in the Chicago Memorandum of Agreement (R. 118).

Finally, the letterhead used in making the settlement agreement of January 23, 1946 clearly indicates the joint identity of Chicago Junction Railway and the River Road. This letterhead is as follows (R. 88):

> "Chicago Junction Railway
> (The C. R. & I. R. R. Co., Lessee)
> The Chicago River & Indiana Railroad Company"

In the settlement agreement trainmen are described as "C. J. Crews" (R. 88). Plaintiffs stipulated that this settlement agreement "provided that said work of moving and switching cars be given to River Road trainmen" (R. 56).

It is obvious from this recital of facts that employees of the Chicago Junction made a collective bargaining agreement with their employer on December 20, 1919; that when the Commission on May 16, 1922 authorized the River Road to take over the Chicago Junction, Junction employees became River Road employees and continued this agreement in the name of the Chicago Junction; and that the River Road employees still continue to do so.

REPLY TO PLAINTIFFS' ARGUMENT.

Reply to Section I of Brief.

In pages 22-23 of their brief plaintiffs argue that an indispensable party has no right to intervene on the ground that he is an indispensable party; that this is a question which may properly be brought up only by existing parties or by the court. All that we are able to make of this argument is that the conventional properties might best be served if the absent party allowed someone else to note his absence before making his appearance. As we pointed out in our brief, page 17, this was done first by the defendants (R. 77) and then by the Brotherhood on its motion to file a special appearance for this purpose (R. 67). Surely plaintiffs do not mean that an applicant for intervention must show any greater interest in the litigation than that he is an indispensable party. Of course, once the party applies for general intervention, his absence is no longer a live question, but it does not follow that a showing of indispensability as a party is improper, even though it may be far more than is needed to allow intervention of right. We are willing to concede that a showing of indispensability more than states a claim to intervention of right. The highly important point, which is apparently overlooked by plaintiffs, is that when the intervenor has such an interest in the litigation that he is an indispensable party, former action taken by the court in his absence obviously cannot bind him.

Reply to Section II of Brief.

In pages 24-26 of their brief, plaintiffs argue that Rule 24(a) of the Rules of Civil Procedure, providing for intervention of right in certain cases, presupposes that the applicant for intervention has a direct interest in the issues. We can agree with this statement, so long as it is not construed as a limitation on a right of intervention which is unconditionally provided by Federal statute. When Federal statutes do so provide, any requirement of interest must be held to have been satisfied, although plaintiffs are apparently unwilling to acknowledge even this. Rule 24(a) does not and cannot require that the applicant show, in addition to his right under the statute allowing intervention, an interest in the case which would entitle him to intervene without the benefit of the statute.

To avoid any such interpretation is undoubtedly the purpose and inevitable effect of stating sub-divisions (1) and (2) of Rule 24(a) in the disjunctive, so that an applicant shows the right of intervention who can identify himself under sub-division (1) as a person whose intervention is unconditionally provided by Federal statute, "*or*" that under sub-division (2) he has an interest which is or may be inadequately represented by other parties, and that he is or may be bound by the judgment. Plaintiffs evidently believe that both these sub-divisions of the Rule must be satisfied in order to make out a case for intervention of right. They so state elsewhere in their brief (page 53):

> "Whether appellant is entitled to intervene as of right depends solely upon whether it has alleged in its pleadings facts sufficient to establish such right under Rule 24 (a) (1) *and* (2) of the Rules of Civil Procedure" (emphasis supplied).

Reply to Section X of Brief.

In Section X of their brief (pages 65-69) plaintiffs argue that the two Federal statutes relied on by the Brotherhood as requiring allowance of its application for intervention under Rule 24 (a)(4) are inapplicable. It is curious that an issue so crucial as this one is to the appeal should be removed from the logical place it had in appellant's brief and given such deferred treatment in plaintiffs' brief. We shall take the liberty of making our reply here.

The first statute relied on by the Brotherhood is Section 17 (11) of the Interstate Commerce Act, (54 Stat. L. 916) reading as follows:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees."

Plaintiffs do not question the fact that this is a proceeding arising under the Interstate Commerce Act. Nor do they claim that any one of the above words used in the statute is lacking in perfect clarity. Yet plaintiffs say that the above quoted provision refers only to Commission hearings, and not to court proceedings (Br. 66-67). Their contention is founded solely on the fact that the phrase "Commission procedure" appears in the sub-title of this section, and that the above provision has thereby been so restricted that it cannot apply to court proceedings arising under the Act. We demonstrated in our brief (page 28) that the long established rule of construction in such cases is that the title of an act cannot control plain words in the body of the statute. *United States* v. *Fisher*, 2 Cranch 358. Plaintiffs make no mention of this case, although it plainly rejects the construction contended for by them.

Plaintiffs' only other contention in connection with this statutory provision is that even if it does provide for intervention in court proceedings as well as those before the Commission, it is unavailing to the Brotherhood because there has been no showing that this suit "affects" River Road employees, as required by this statute (Br. 68). This argument is best answered on page 53 of plaintiffs' brief, wherein they state that River Road trainmen are and will be "bound by the preliminary injunction issued in this case and will also be so bound by any like permanent injunction which may be issued."

The second statute relied on by the Brotherhood in its application for intervention of right is in the Judicial Code, Sections 212, 213 (28 U. S. C. A. Sec. 45a). It is quoted in substantial part in our brief (pages 24-25) and it is set out in full in the appendix to plaintiffs' brief. The portion particularly pertinent here is as follows:

> "• • • associations • • • who are interested • • • in any suit which may be brought by any one under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission may intervene in said suit or proceeding at any time after the institution thereof • • •"

Except for a faint intimation that this suit may not be one "relating to action" of the Commission, plaintiffs' only argument against the applicability of this statute to our case is the same as made against the Interstate Commerce Act provision above discussed: that the intervenor must have an "interest," and that none has been shown. As before, plaintiffs argue that the "interest" intended is that which would require allowance of the application under "the general doctrines of intervention." We have previously shown that this argument merely amounts to an assertion that these two statutes, although they obviously purport to confer the right of intervention, do not accom-

plish any such purpose in that any applicant for intervention who relies on them must also show that he is entitled to intervene, without the aid of the statutes, under the "general doctrines of intervention." We are confident that no authority will be found to support the notion that statutes allowing intervention should, so far as possible, be construed to mean nothing.

If by naming River Road employees as persons to be enjoined, the plaintiffs have not identified these employees as persons "affected" by this suit and "interested" in it within the meaning of these statutes providing for intervention of right, then Section 5 (2)(f) of the Interstate Commerce Act unmistakably shows that the trainmen's collective bargaining agreement provides them with such an interest as is entitled to the protection of intervention in suits such as this. That is the section of the Act from which is derived the authority of the Commission to enter the order involved here. It now contains the following provision:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (54 Stat. L. 906.)

Reply to Sections III-V of Brief.

In pages 26-42 of their brief plaintiffs argue that the Brotherhood could not acquire rights under their collective bargaining agreement which "would nullify or render unenforceable" the order of the Commission. Of course this assumes that no interpretation of the order other than that contended for by plaintiffs can even be heard, and that it has therefore been determined already that a violation

exists. Ironically, plaintiffs do concede (Br. page 39) that an issue in the case concerning the order is "whether it has been violated." They also acknowledge that the defendant carriers and the Brotherhood have denied that a violation exists (Br. 12, 38). These matters have been ignored in these sections of plaintiffs' brief, and they have again fallen into the error, as they did in previous briefs submitted on this appeal, of assuming not merely that the order and the bargaining agreement are in hopeless conflict with each other, but that any suggestion to the contrary is unthinkable and must not be permitted to be made. This, as we have previously pointed out, is an attempt to try the case backwards by assuming that it has already been decided on its merits, *i. e.*, that the order has been violated and that the trainmen, who stand convicted *in absentia*, are intruders in court when they seek to plead not guilty.

The question raised on this appeal is not whether the Commission order has been violated by the trainmen's bargaining agreement, but whether the trainmen, being the principal parties charged with the alleged violation, shall have the right to defend themselves. We do not consider it necessary to discuss all the cases cited by plaintiffs to the effect that a Commission order may not be collaterally attacked. But we note that plaintiffs have attempted in this part of their brief (pages 33-35) to distinguish the case of *Gulf M. and N. Co. v. Illinois Central*, 21 F. Supp. 282, cited in our brief (page 31) on the point of inadequacy of representation. In so doing, plaintiffs make this statement:

> "There [in the *Gulf* case] the order made no reference to the use of crews, whereas here [in our case] all operating arrangements, including particularly the method of handling the cars here in question, were required to be continued in effect." (Br. page 34.)

In our case neither the Commission order and report (R. 12-37), nor its conditions (R. 22-25) require the use of particular crews in the performance of the disputed work. Moreover, the above statement by plaintiffs is in error as to the *Gulf* case, because there the report of the Commission, which was made part of its order, specifically referred to the fact that the Gulf company used its own engines while operating on Illinois Central tracks "and in charge of its own employees" (21 F. Supp. at page 289).

Reply to Section VI of Brief.

In pages 42-44 of their brief, plaintiffs contend that the trainmen have failed to show that they will be sufficiently damaged by the injunction to warrant their intervention. This argument is based on the theory that although the River Road trainmen say the injunction deprived them of work they were doing when the suit was started, they do not also allege that they are not otherwise employed on a full time basis, and that they therefore fail to show that they could do the work in question if they were permitted to do so. It hardly seems necessary to say that the cases cited by plaintiffs in this section of their brief do not support the proposition that the right to work under an employment contract is ordinarily a thing of no value, and that it may therefore be enjoined without harm to the worker unless he affirmatively shows peculiar circumstances of damage. If on a later trial on the merits plaintiffs can show any facts in mitigation of damages it will be to their advantage to do so.

Plaintiffs advanced an argument in this same general vein in their defense of the appeal by the Junction from the temporary injunction issued against it in this case. *Baltimore and O. R. Co.* v. *Chicago Junction Ry. Co.*, 156 F.

(2d) 357. The Court of Appeals disposed of it as follows (at page 360):

> "The only argument in favor of the injunctive relief against Junction is that such relief will not harm it. Heretofore that has not been a sufficient ground for an injunction."

Reply to Section VII of Brief.

In pages 44-52 of their brief, plaintiffs argue that even if the River Road trainmen have a valid contract to the disputed work, they should not be allowed to intervene because their remedy against the River Road for damages will not be affected by the injunction. This is only a minor variation of the point last discussed above that the trainmen might have work elsewhere, and thus not be legally damaged at all by the injunction. The *California Canneries* case, (279 U. S. 553), cited on page 44 of plaintiffs' brief, is not authority for either of these arguments. What that case primarily held is that an appeal in an Anti-Trust Act suit from an order denying intervention was not within the jurisdiction of the Court of Appeals, because such appeals must be taken direct to the United States Supreme Court under the Expediting Act. It is true that the opinion also stated that denial of intervention is not appealable at all unless the applicant has a "direct and immediate interest" in the suit, and thus the Court inferentially questioned whether the applicant for intervention in that case was entitled to intervene as of right. But this language in no manner prejudices the Brotherhood's right to intervene here. The Canneries had not been enjoined, while here an injunction directly against Brotherhood members is involved. More important, intervention of right is plainly provided by Federal statutes in our case, whereas no such statutes providing for intervention were involved

in the *Canneries* case. Lastly, that case involved a consent decree under the Anti-Trust Act which only rendered inoperative a contract between the defendant and the Canneries, which contract contained a specific escape clause authorizing the defendant to terminate it in the event of governmental action of the nature which was taken. The application to intervene was not made until more than two years after the entry of the consent decree. We have no such case here.

It is asserted on page 50 of plaintiffs' brief that we have cited no authority for the proposition that when A sues B to enforce an obligation from B to A, parties holding subsequent contracts with B which might be impaired by a judgment in favor of A have any right to intervene in the action. Of course this is purely hypothetical, because it does not describe the situation presented here. We have a suit by A to enjoin employer B *and employee C* from carrying out an employment contract between B and C. It is brought by A against B for an injunction against both B and C, but without naming employee C as a party. A brings the suit on the claim that the subject matter of the employment contract, *i. e.*, the work done thereunder, belongs exclusively to him. The nature of the suit is such that the employee C is specifically authorized by statute to protect his employment through intervention. Our brief is largely devoted to citation of authority in favor of the proposition that intervention is warranted in this situation.

Plaintiffs also assert in this section of their brief (pages 50-51) that the rate of $12.96 per car charged by the River Road for handling stock cars, as against $2.00 per car ($1.00 each way) for use of River Road tracks is a "highly profitable" charge, and would put the plaintiffs at a competitive disadvantage with the New York Central. This assertion, which at all events can obviously have nothing

whatever to do with the subject of intervention by the Brotherhood, is wholly without foundation in the record. It seems almost needless to say that no record references are mentioned in support of it. For all that the record shows, this rate, which is stated by the stipulation to have been fixed by the Chicago Switching Committee in 1945 (R. 55), may be unprofitable and burdensome to the railroad which handles such movements, for the River Road under this arrangement furnishes both the power and the crews. We think this assertion by plaintiffs, apparently addressed as it is to supposed general equities in their favor, is a red herring. The same observation may be made as to plaintiffs' additional intimation at this point in their brief that shippers in the Stock Yards might not get adequate service if the River Road trainmen handle the disputed movements. Plaintiffs make no record references on this subject either. We submit that both arguments should be disregarded.

Reply to Section VIII of Brief.

In pages 52-53 of their brief, plaintiffs argue that although direct injunctive relief is sought against River Road employees, that fact has no bearing on the question whether they should be allowed to become parties. The suggestion is made on page 53, apparently with all seriousness, that River Road trainmen, instead of entering this suit in defense of their work, should simply quit their jobs entirely, and thus free themselves of the binding effect of the injunction. Plaintiffs do not attempt to distinguish, in this connection, the case of *International Brotherhood* v. *Keystone Freight Lines*, 123 F. (2d) 326, previously cited by us, wherein the court said (page 329):

> " * * Plaintiff sought affirmative relief not only against the defendant companies but also against Intervenor and its members when it prayed for an in-

junction against defendants, their agents, servants, and employees. * * * Its right of intervention was not permissive, but absolute. * * *"

As for plaintiffs' suggestion (Br. 52) that Rule 65 (d) of the Rules of Civil Procedure authorizes the issuance of the injunction against the employees without their being made parties to the suit, the court said in the same case (page 330):

"Rule 65 (d) of the New Rules of Civil Procedure limits the binding effect of an injunction to the parties to the action, their officers, agents, servants, employees and attorneys, and to those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

"Here none of the elements necessary to bind one not a party to the action are present. Intervenor cannot be bound on the theory of representation nor because its members are servants of the defendant companies. The defendant companies do not represent Intervenor. Their interests are in conflict with those of Intervenor and its members. They discontinued their relations with Plaintiff because to continue them would lead to strife and strikes with the employees on account of the provision in the contract with the employees which forbade the defendant companies from handling merchandise of concerns classified as unfair to labor. The elements of representation or identity of interest between Intervenor and defendant companies are wholly absent, and Intervenor and its members may not be bound by the injunctive decree without being parties to the action."

Reply to Section IX of Brief.

In pages 54-65 of their brief, plaintiffs undertake to show that the representation of whatever interest the River Road trainmen may have in this suit has been adequately made by the River Road.

As to the River Road's failure to urge the applicability of the Norris-LaGuardia Act against the injunction, plaintiffs argue (page 55) that this suit does not involve or grow out of a labor dispute because "Neither the plaintiffs nor the court are in any way concerned with the considerations which might have influenced the defendants to commit a breach of the order." This is no more than a statement that the plaintiffs do not care whether or not the suit involves or grew out of a labor dispute. It is certainly no answer to the broad definition of a suit involving or growing out of a labor dispute which is set forth in the Norris-LaGuardia Act. Quotations from that Act (29 U. S. C. A. Sec. 113) are as follows:

"Sec. 113. Definitions of terms and words used in chapter

"When used in sections 101-115 of this title, and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; * * * whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers * * * and one or more employers * * * or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment * * * regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Plaintiffs' argument does not even touch the decisions decided under the Act, which we cited (Br. 29-31) in support of the proposition that where the subject matter of a suit by one carrier against another deals with the subject of a collective bargaining agreement between the defendant carrier and its employees, and disturbance of the relationship between the defendant and its employees is thereby threatened, the suit must be held to involve or grow out of a labor dispute. *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 F. (2d) 931 (10th Circuit 1942), certiorari denied in 317 U. S. 645; *Southeastern Motor Lines, Inc.* v. *Hoover Truck Company, Inc., et al.*, 34 F. Supp. 390 (D. C. Tenn., 1940).

These two cases also refute plaintiffs' argument that since the Norris-LaGuardia Act deals generally with injunctions in a labor dispute, it is inapplicable to a specific statute, such as the Interstate Commerce Act, which provides for injunctive relief. Both of the last cited cases were suits for injunctions brought under the Interstate Commerce Act, Chap. 8 (Motor Carrier Act).

As the court said in the *Lee Way* case, at 933:

"* * * whatever other remedies may or may not be available, there is nothing in the exactions of the Motor Carrier Act which operates to enlarge beyond the limitations of the Norris-LaGuardia Act the jurisdiction of a United States Court in respect to the issuance of a restraining order or a temporary or permanent injunction involving or growing out of a labor dispute."

The case of *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, relied on by plaintiffs (Br. 56), is easily distinguishable from our case. In the *Virginian* case relief was sought under Section 2, Ninth, of the Railway Labor Act (45 U. S. C. A. section 152), dealing with the particular type of labor dispute which was involved in that case between the carrier and its employees. The railroad attached the decree in that case both under the Railway Labor Act and the Norris-LaGuardia Act. The Court held that the railroad had shown no violation of either statute. Specifically referring to the railroad's objections that the Norris-LaGuardia Act had been violated by issuance of the injunction, the Court said (at page 563):

> "* * * they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose * * *"

The Court did not find that there was any conflict between the Railway Labor Act and the Norris-LaGuardia Act. And in the later case of *Brotherhood* v. *Toledo, Peoria & Western*, 321 U. S. 50, it was expressly held (page 58) that there is a "basic common policy" between the two statutes.

Plaintiffs further argue (Br. 59) that the Norris-LaGuardia Act is inapplicable because this is a suit brought by the United States, acting through the Interstate Commerce Commission, within the meaning of the rule announced in *United States* v. *United Mine Workers of America*, 67 S. Ct. 677. The provision of the Interstate Commerce Act under which this suit was brought (49 U. S. C. A. section 16 (12)) is that:

> "* * * the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to any District Court of the United States of competent jurisdiction for the enforcement of such order."

This provision in itself clearly distinguishes the Commission from the United States. The Commission did not institute this suit, as plaintiff carriers infer on page 60 of their brief. It was only permitted to intervene, which it did not even purport to do on behalf of the United States, but did so only for itself, as is plainly shown by its complaint of intervention (R. 47-49). The Commission did not substitute itself for the railroads which brought this suit; it merely added itself to them as an intervening plaintiff. The United States, whose interests in interstate commerce cases are required under the Judicial Code (Sections 212, 213 (28 U. S. C. A. section 45 a)) to be represented by the Attorney General, is clearly not a party to this suit. The rule in the *Mine Workers* case that an injunction sought by the United States in a labor dispute with its employees is outside the scope of the limitations of the Norris-La-Guardia Act obviously cannot be extended to cover a case in which the dispute is between private employers and private employees and the United States is not even a party to the case.

At this point we believe it appropriate to comment briefly on the attempt made by plaintiff carriers to create the impression in this part of their brief that their efforts to prevent the River Road trainmen from having their day in court in this case are made in the public interest. As pointed out above, the only public body in this suit is the Commission, and it does not purport to represent the United States. If any party to this suit can assume to speak in the public interest, it is the Commission, and not the plaintiff carriers. *The Commission did not oppose the Brotherhood's application for intervention.* Counsel for the Commission stated that the Commission took a "neutral" position with respect to intervention by the Brotherhood (R. 135).

No cloak of pretended authority to speak for others can hide the fact that the plaintiff carriers represent only themselves in this case, and that their desire to exclude the River Road trainmen from participating herein is motivated by nothing nobler than the plaintiff carriers' selfish interest.

Conclusion.

Plaintiffs have not advanced any sound reason for denial of the Brotherhood's application for intervention, as a matter of right, and such intervention should have been granted on each of the following grounds:

The Brotherhood is an indispensable party;

Federal statutes confer upon the Brotherhood an unconditional right to intervene;

The employees represented by the Brotherhood are or may be bound by a judgment in the action, and the representation of their interest by existing parties is or may be inadequate.

Respectfully submitted,

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May 3, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
AN UNINCORPORATED ASSOCIATION,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,
Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

APPELLANT'S REPLY TO SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES.

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May 9, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
AN UNINCORPORATED ASSOCIATION,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,
Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
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THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

APPELLANT'S REPLY TO SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES.

If the Court permits the filing of and considers the Supplemental Brief of Plaintiffs-Appellees, then the appellant respectfully requests that this reply be filed and considered in the disposition of this case.

On the hearing of the cause May 6, 1947, counsel for the appellant stated, in response to a question of Mr. Justice Reed, that the Brotherhood of Railroad Trainmen, the representative of employees, received a certified copy of the preliminary injunction. Whether counsel stated that such copy was "served" or "furnished" counsel does not know. Counsel recalls that, in this connection, he invited the Court's attention to page 105 of the Record, the pertinent portion of which is as follows:

> "The first and only notice or other process relative to any proceedings had in the above suit which was served upon any of the above-named Brotherhoods, or any of their members, was on March 14, 1946, when each of said Brotherhoods was furnished a copy of the preliminary injunction hereafter described."

On further examination of the Record, the appellant finds and invites the attention of the Court to the following statement at page 127 of the Record:

> "These defendants promptly informed the Brotherhood of Railroad Trainmen of the filing of this suit on February 18, 1946. They sent to the Brotherhood of Railroad Trainmen on March 14, 1946, a certified copy of a temporary injunction entered that day by this court."

Respectfully submitted,

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May 9, 1947.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, The CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ERNEST A. BALLARD,
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WALTER I. DEFFENBAUGH,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees

STATEMENT OF PLAINTIFFS-APPELLEES OF GROUNDS IN OPPOSITION TO THE APPELLATE JURISDICTION OF THE ABOVE COURT, PURSUANT TO SUPREME COURT RULE 12

Plaintiffs-Appellees state the following matters and grounds against the jurisdiction of this Court as asserted by the appellant herein, in its statement of the basis of the

appellate jurisdiction, filed herein on the 6th day of January, 1947, as required by Rule 12 of the Supreme Court.

1. The statutes relied on by the appellant herein to sustain the appellate jurisdiction of this Court, namely, the Judicial Code, Section 238 (28 U. S. C. A. 345), the Judicial Code, Section 210 (28 U. S. C. A. 47 a) and 28 U. S. C. A. Section 44 are not applicable to this case because the order of the Court below denying appellant's petition to intervene is not a final and appellable order, as is apparent from the nature of the suit and the allegations of appellant's petition to intervene.

The Complaint of Plaintiffs-Appellees (R. 3-57)

As shown by the allegations of the complaint filed herein, this is a suit under paragraph (12) of Section 16 of Part I of the Interstate Commerce Act (49 U. S. C. A. Sec. 16, par. 12) (R. 7) for the purpose, among others, of enjoining disobedience of an order of the Interstate Commerce Commission (hereinafter called the Commission) entered May 16, 1922, in the *Chicago Junction* case, 71 I. C. C. 631.

Plaintiffs are eight trunk line carriers engaged, *inter alia*, in the transportation by railroad of carload shipments of livestock, other than hogs and sheep, from the Union Stock Yards, Chicago, Illinois, to destinations east and southeast of Chicago (R. 5).

Defendants are The New York Central Railroad Company (herein called the Central), The Chicago River and Indiana Railroad Company (herein called the River Road), and Chicago Junction Railway Company (herein called the Junction) (R. 5).

The Central is a trunk line carrier engaged, *inter alia*, in the same transportation as that of plaintiffs above referred to. The River Road is a switching line serving the Union Stock Yards, all of the capital stock of which

was acquired by the Central on May 19, 1922, pursuant to authority granted by said order of May 16, 1922, on certain conditions. The Junction is a railroad company which on May 16, 1922, and on the same conditions, leased its entire railroad to the River Road for 99 years, and thereafter, at the option of the lessee, in perpetuity (R. 5-6, 9).

Said order of May 16, 1922, was entered on an application, filed by the Central with the Commission on December 28, 1920, for approval, *inter alia*, of the following proposed transactions:

> "(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;
>
> "(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity." (R. 7)

The report and order of the Commission (R. 20-46) entered on said application approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows (71 I. C. C. p. 650):

> "That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive." (R. 46)

The conditions so referred to included the following condition (71 I. C. C. p. 639):

> "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central." (R. 31)

After having enumerated the foregoing conditions in said report, the Commission made the following finding (71 I. C. C. p. 641):

> "*Subject to the observance of the above conditions we find that the acquisition* by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction *will be in the public interest.*" (Italics ours.) (R. 33)

On May 19, 1922, pursuant to the approval and authorization granted in said order of May 16, 1922, the Central acquired control of the River Road by the purchase of its capital stock, and the River Road acquired control of the property (owned and leased) of the Junction by lease. Said control of the River Road by the Central and of the property of the Junction by the River Road has continued from that date down to the present time and is still in effect (R. 9).

On December 3, 1928, the Commission made and entered its report on further hearing and order in said *Chicago Junction* case (150 I. C. C. pp. 32-38) in which it amended condition 14 of its report and order of May 16, 1922, but said amendment is in no way pertinent to any issue in this case. As so amended said report and order of May 16, 1922, are still in full force and effect (R. 9-10).

On January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding entitled "The Baltimore and Ohio

Railroad Company, et al. v. United States of America, et al., In Equity No. 3427," in which all of the plaintiffs herein or their respective predecessors in interest and all of the defendants herein were parties, entered a final decree with respect to said order of May 16, 1922, by which it found and decreed as follows:

> "* * * and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties." (R.10.)

From May 20, 1922, to the present time the Central has had and now has control of the traffic and operating relationships existing between the Junction and the River Road on the one hand and the plaintiffs, respectively, on the other hand (R.10).

On May 16, 1922, and for many years prior thereto, plaintiffs moved empty livestock cars used for the loading of livestock, other than hogs and sheep, *with their own power and crews* from their respective lines, via their respective connections with the line of the Junction now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of loading *with their own power and crews* over said line to its connections with their respective lines and thence to destinations as consigned and routed by the shippers (R. 7).

Referring to this operating practice the Commission, in its report accompanying the order of May 16, 1922, said (71 I. C. C. p. 633):

> "All parties concede that that is the only practical method of handling that traffic" (R. 23).

For the privilege of so moving said cars plaintiffs, respectively, on and immediately prior to May 16, 1922, and continuously thereafter to February 1, 1946, paid the River Road and the River Road accepted $1.00 per car, loaded and empty. On or about January 25, 1946, the Central and the River Road notified plaintiffs that on and after February 1, 1946, plaintiffs would not be permitted to move said stock cars as aforesaid, and that such cars, when destined to places of loading on the line of the River Road in said Union Stock Yards would be moved by the power and crews of the River Road from the point of interchange with plaintiffs, respectively, on the line of the River Road to such places of loading and after they had been loaded at such places of loading by shippers, would be moved thence by the power and crews of the River Road to the points of interchange with plaintiffs, respectively, on the line of the River Road, and that at such points they would be delivered by the River Road to the plaintiffs, respectively, and that the charge of the River Road for such handling would be $12.96 per outbound loaded car instead of the charge of $1.00 per car loaded and empty, theretofore charged to and paid by the plaintiffs (R. 10-11).

On and after February 1, 1946, the Central and the River Road proceeded to act in accordance with said notice and this action was brought by the plaintiffs on February 12, 1946, to compel obedience by the defendants to condition No. 3 in said order of May 16, 1922, it being alleged that the aforesaid action of the defendants pursuant to said notice of January 25, 1946, was in violation of said condition (R. 11-13).

Intervention by the Commission

The Commission filed a petition to intervene as party plaintiff and on February 21, 1946, by order of the Court was given leave to intervene as a party plaintiff and to file

its complaint of intervention. The complaint of the Commission alleged that the action of the defendants Central and River Road as above outlined was in violation of the Commission's order of May 16, 1922, and asked a preliminary and a permanent injunction against defendants compelling obedience to condition No. 3 of said order (R. 58-63).

Stipulation of Facts (R. 64-74)

Plaintiffs, defendants and the Commission entered into a stipulation of facts to be considered as evidence in the cause on the hearing on the motions of the plaintiffs and the Commission for a preliminary injunction, which facts were to be taken as true and binding on the parties except that objections might be made to the relevancy and materiality thereof. The stipulation of facts admitted as true the facts above outlined from the allegations of the complaint (R. 59-72). Said stipulation of facts also recited that the Brotherhood of Railroad Trainmen (appellant herein), bargaining agent under the Railway Labor Act for River Road trainmen, having failed to settle certain disputes—among others a demand, claimed by said Brotherhood to be based upon a contract with the River Road, that River Road trainmen be given the work of moving and switching the livestock cars hereinabove referred to—notified the River Road, under authority of an almost unanimous strike vote of said trainmen that unless said disputes were settled before 10:30 P. M. January 23, 1946, River Road trainmen would go out on strike at that hour. Under continued threat of such a strike the River Road shortly before the hour set for said strike made an agreement with said Brotherhood which, among other things, provided that said work of moving and switching livestock cars be given to River Road trainmen. Said stipulation further recited that J. E. McKee, Vice-President of the River Road and

of the Central, participated in the negotiations with the Brotherhood and signed the foregoing agreement as Vice-President of said railroads (R. 72).

The Preliminary Injunction (R. 75-87)

On March 14, 1946 (R. 75) the court below entered a preliminary injunction pending the further order of the Court enjoining the defendant railway companies, "their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with them," from failing and neglecting to obey said order of May 16, 1922, with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards, and from violating condition No. 3 of said order in the like respect, and commanding them to permit plaintiffs to move their said cars over the line of the River Road as had been the practice prior to February 1, 1946 (R. 85-87).

Thus the form and scope of the injunction followed substantially paragraph (d) of Rule 65 of the Rules of Civil Procedure for District Courts of the United States, which provides that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Appellant's Motion to Intervene (R. 135-146)

On May 20, 1946 (R. 134) the appellant presented to the court below its motion to intervene in this cause. This appeal has been taken from the order of the court below denying said motion.

Said motion to intervene alleges that for many years the appellant "has acted as the collective bargaining represen-

tative for all persons employed as trainmen by the defendant, The Chicago River and Indiana Railroad Company." (R. 135). It was as such representative of the River Road trainmen that appellant sought to intervene. The motion alleges that under a contract made by the appellant with the River Road on behalf of the latter's trainmen, those trainmen are entitled to do the work that has heretofore been done by employees of the plaintiffs in their operations over the line of the River Road. The motion does not allege definitely when this so-called contract right originated except that the contract "has been in effect for several years last past" (R. 136). It is alleged that the appellant on behalf of the River Road trainmen "for some time" protested (R. 136) to the River Road over the failure of the River Road to permit its trainmen to do said work and that on January 23, 1946, the River Road made a settlement with the appellant to the effect that River Road's trainmen should do the work. This settlement was in the form of a "written interpretation" of the alleged agreement (R. 137). From the allegations of the motion it is evident that the alleged original agreement was ambiguous in its terms and the resultant ambiguity was not resolved in favor of the trainmen until January 23, 1946. However, this point would appear to be of no importance since there is no allegation that the alleged contract existed on May 16, 1922, the date of the Commission's order, or for many years thereafter. Manifestly it could not have been in existence at the date of the order since the effect of the order was to continue the *status quo* as to the operating practices here involved, and hence the *status quo* of both the employees of the plaintiffs and of the River Road, which had existed for many years.

The appellant therefore is basing its right to intervene upon an alleged contract with the River Road which is

directly in conflict with the order of the Commission and which was made after, and apparently long after, the order of the Commission was entered.

Thus appellant's motion to intervene does not allege facts which, if true, would permit it to intervene as a matter of right. This is true for several reasons, which we briefly state as follows:

(a) The River Road Could Not, Through a Purported Contract With Appellant, Create any Rights in its Trainmen Which Would Nullify or Render Unenforceable the Antecedent Order of the Commission.

The duties imposed upon the defendant companies by condition No. 3 of the Commission's order are duties imposed not only for the benefit of the plaintiffs but in the public interest, pursuant to authority granted the Commission under the Interstate Commerce Act. The order of the Commission here involved was issued pursuant to paragraph (2) of Section 5 of the Interstate Commerce Act (49 U. S. C. A. Sec. 5 (2)).

The criterion by which the Commission is to be governed in issuing orders in exercise of the authority conferred by said Section 5 (2) is the public interest.

N. Y. Central Securities Co. v. *U. S.*, 278 U. S. 12, 24.
Texas v. *U. S.*, 292 U. S. 522, 530.

Obligations so imposed by the Commission in the public interest may not be terminated by a court, but only by the Commission.

Thompson, Trustee, v. *Texas Mexican Railway Co.*, 66 S. Ct. 937, 945.

A fortiori they cannot be affected or impaired by any agreement between a carrier and its employees.

(b) **Appellant's Motion to Intervene, With the Accompanying Motion to Vacate the Preliminary Injunction, Show that Appellant is in Fact Attempting a Collateral Attack Upon the Order of the Commission, Which is Not Permitted.**

Paragraph (c) of Rule 24 of the Rules of Civil Procedure requires a motion to intervene to be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The only pleading which accompanied appellant's motion to intervene was a motion to vacate the preliminary injunction, to assess damages against the plaintiffs on account of such injunction, and for summary judgment in favor of appellant (R. 148-153). The motion is therefore in effect an attack upon the order of the Commission and an attempt to have the Court nullify the same through a refusal to enforce it.

Under the provisions of paragraph (12) of Section 16 of the Interstate Commerce Act (49 U. S. C. A. Sec. 16 (12)), pursuant to which this suit is brought to enforce obedience to the order, the only issue before the Court is whether the order was regularly entered and duly served (mere formal matters), and whether it has been violated. If the Court so finds, the statute is mandatory:

> "The court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise."

In such a proceeding the defendant may not question the validity of or otherwise attack the order. Suits to set aside orders of the Commission may be tried only under the Urgent Deficiencies Act, 28 U. S. C. A. Sec. 47, before a court of three judges.

Powell v. *United States*, 300 U. S. 276, 288.
Interstate Commerce Commission v. *Consolidated Freightways*, 41 F. Supp. 651, 655.

The mere fact that appellant's pleading, tendered with its motion to intervene, does not ask that the order be declared invalid, does not establish that the purpose of the intervention is not an attack upon it. Any position taken by appellant which would deny to the order its full and legitimate effect, and the right to its enforcement, is essentially an attack upon the order itself.

Venner v. *Michigan Central R. R. Co.*, 271 U. S. 127, 130.

Furthermore, any question as to the validity of the order is, by reason of the above-mentioned final decree entered by the court below on January 15, 1929, *res judicata* as to the River Road and as to appellant, whose claim is based upon a subsequent contract with that road.

Johnson Co. v. *Wharton*, 152 U. S. 252, 257.
Cromwell v. *County of Sac*, 94 U. S. 351, 352.

(c) If Appellant Has a Legitimate Complaint Against the Order, Appropriate Remedies are Available to it.

If the trainmen, whom appellant purports to represent, have any rights not stemming from the contract with the River Road which are invaded by the order, it may bring suit under 28 U. S. C. A. Sec. 47 to set aside the order. As above shown, this is the only way in which the order may be attacked in the courts.

Furthermore, condition No. 17 of the order provides (Complaint, p. 30):

> "Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose."

Appellant should be remitted to a choice of those remedies and should not be allowed to enter this proceeding for the purpose of attacking the order.

(d) **Neither the Allegations of the Motion to Intervene Nor the Accompanying Motion to Vacate the Preliminary Injunction Show That the River Road Trainmen Will Sustain Any Loss From the Enforcement of the Order.**

The allegations of the motion to intervene are that, under appellant's contract with the River Road, the latter agreed that its trainmen should be permitted to do the work theretofore performed by plaintiffs' employees. In addition, the affidavit in support of the motion to vacate the preliminary injunction, etc., alleges that the employees of the River Road "are losing work to which they are entitled and wages therefor believed to be in excess of $200 per day" (R. 158).

The claim is one for special damages, and it is well settled that the allegations in support of such a claim must be sufficient to show that damage necessarily resulted.

The Director, 26 Fed. 708, 713.
Dissette v. *Dost*, 280 Fed. 455, 456.
Gray v. *Shoonmaker*, 30 F. Supp. 1019, 1023.

The rule is not satisfied here. While the allegation is made that the employees represented by appellant are being deprived of particular work that they are entitled to do, it is not alleged that they are not now working full time and therefore could do the work in question if permitted to. This is a vital defect in appellant's allegation of damages.

The above-mentioned affidavit also alleges that the River Road employees "are now filing time claims against said carrier arising out of such violation (of the alleged con-

tract between appellant and the River Road) but have been paid nothing on account thereof" (R. 158). It is not clear that this is intended to be an allegation of damages suffered as a result of the injunction. It is entirely different from the theory of damages through deprivation of work above discussed. Whether this allegation states a valid claim or not, it does not state one *against the plaintiffs.* If the claims referred to are valid, the employees of the River Road may proceed *against that company.* But those claims will not be passed upon in this suit, and the fact that they exist does not show the River Road employees will suffer a loss from the enforcement of the Commission's order in this suit. It shows the contrary.

(e) Assuming, Arguendo, That the Appellant Has a Valid Contract With the River Road, Such Fact Would Not Entitle it to Intervene.

Rule 24 (a) of the Rules of Civil Procedure giving an absolute right to intervene in certain cases presupposes a direct interest in the issues. As the courts and text writers have consistently pointed out, this was the case when intervention was governed by former Equity Rule 37, and Rule 24 (a) merely continues in effect Rule 37.

In *Pipe Line Co.* v. *U. S.*, 312 U. S. 502, this Court, in an opinion by Mr. Justice Frankfurter, at page 508, characterized Rule 24 (a) as containing "the codification of general doctrines of intervention."

To the same effect are *Babcock* v. *Town of Erlanger*, 34 F. Supp. 293, 295; *Jewell Ridge Coal Corp.* v. *Local 6167, United Mine Workers of America*, 7 Fed. Rules Serv. 460; 6 Cyclopedia of Federal Procedure (2nd edition), pp. 477, 479, 480, 482.

In *Smith* v. *Gale*, 144 U. S. 509, this Court said (p. 518):

> "To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some

part thereof in suit, or lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation."

The River Road trainmen have no direct interest in or claim to the obligation of the defendant companies embodied in the order of the Commission which this suit seeks to enforce. Even though the incidental effect of the judgment might be to deprive them of the work which it is alleged the River Road has agreed they may do, nevertheless the judgment would not deprive them of any rights which they might have against the River Road for breach of their alleged contract. Neither the meaning nor the validity of that contract is in issue.

That the trainmen's interest in having the River Road free to specifically perform its alleged contract with the appellant is not such an interest as to permit appellant to intervene as a matter of right is established by the case of *United States* v. *California Canneries*, 279 U. S. 553, 556. In that case California Canneries had a very valuable contract with Armour & Co. which the decree entered in that suit rendered it impossible for Armour & Co. to perform. Nevertheless the court held California Canneries not entitled to intervene.

(f) **No Statute of the United States Confers on the Appellant an Unconditional Right to Intervene.**

Neither 49 U. S. C. A. Sec. 17 (11) nor 28 U. S. C. A. 45a confers upon appellant "an unconditional right to intervene" within the meaning of 24 (a) of the Rules of Civil Procedure.

49 U. S. C. A. Sec. 17 (11) was incorporated in the Interstate Commerce Act by the Transportation Act of 1940 (Sec. 12, 54 Stat. L. c. 722 at p. 913). Section 12 of that

Act as it appears in the Statutes at Large carries this heading:

> "Commission procedure; delegation of duties; rehearings."

The same heading appears in United States Code Annotated (49 U. S. C. A., Sec. 17). That section relates only to proceedings before the Commission.

If 28 U. S. C. A., Section 45a, relates to a suit such as this, it confers a right to intervene only on those "who are interested in the * * * suit." An interest must be shown. *Boston Towboat Co.* v. *U. S.*, 321 U. S. 632, 633-634. The right to intervene is, therefore, not unconditional. What interest must be shown? As there is no statutory definition of such "interest", the answer must be found in the decisions dealing generally with the interest a petitioner must show in order to be entitled to intervene in a suit. Appellant has not alleged an interest sufficient to entitle him to intervene under the decisions generally, and no statute of the United States gives him any greater right to intervene.

For the reasons above shown, the order of the court below denying appellant's petition to intervene is not a final and appellable order for, as stated by this Court in *United States* v. *California Canneries*, 279 U. S. 553 (p. 566):

> "* * * an order denying leave to intervene is not appealable, *In re Cutting*, 94 U. S. 15; *Credits Commutation Co.* v. *United States*, 177 U. S. 311; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581; *In re Engelhard*, 231 U. S. 646; *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219; *New York* v. *New York Telephone Co.*, 261 U. S. 312, except where he who seeks to intervene has a direct and immediate interest in a

res which is the subject of the suit, compare *French* v. *Gapen*, 105 U. S. 509, 524-526; *Smith* v. *Gale*, 144 U. S. 509; *Leary* v. *United States*, 224 U. S. 567; *Swift* v. *Black Panther Oil & Gas Co.*, 244 Fed. 20, 30."

This Court, therefore, is without jurisdiction to entertain the appeal.

Dated January 22, 1947.

Respectfully submitted,

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POPE & BALLARD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM

Come now The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Grand Trunk Western Railroad Company,

The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, and Wabash Railroad Company, Plaintiffs-Appellees, by Ernest S. Ballard, William F. Price and Walter I. Deffenbaugh, their attorneys, and move this Court to dismiss with costs the appeal taken herein to this Court by the Brotherhood of Railroad Trainmen upon the ground that the order denying said appellant leave to intervene in this cause is not a final and appealable order and that hence this Court has no jurisdiction to entertain said appeal.

And said Plaintiffs-Appellees by their attorneys as aforesaid, in the alternative, move this Court to affirm said order from which said appeal purports to have been taken, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

Dated January 22, 1947.

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FILE COPY

IN THE

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BROTHERHOOD OF RAILROAD TRAINMEN,
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Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLEES IN REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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February 14, 1947.

THE DUNHORP WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLEES IN REPLY TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Plaintiffs-Appellees (hereinafter referred to as plaintiffs) for the purpose of clarity, desire to make a short reply to some matters contained in appellant's brief in opposition to plaintiffs' motion to dismiss or affirm.

I.

Replying to Appellant's Criticism of Plaintiffs' Statement of the Case.

Appellant contends (Brief, p. 3) that plaintiffs are in error in stating that the Commission's order of May 16, 1922, enforcement of which is sought by plaintiffs, antedated the alleged contract between The Chicago River and Indiana Railroad Company (hereinafter referred to as the River Road) and the appellant as representative of its trainmen. Appellant states "The contract was signed December 20, 1919, as shown by the copy of it in the record (Tr. 174)". The reference is to page 14 of the printed pamphlet attached as Exhibit A to the affidavit of Felix E. Kazmer, which affidavit was filed in support of the pleadings accompanying appellant's motion to intervene (R. 154-159). The date of this pamphlet is not shown, but inasmuch as page 2 thereof refers to rates of pay effective October 1, 1937, it is apparent the pamphlet could not long have antedated and probably postdated October 1, 1937. Page 1 of the pamphlet lists the railroads who were parties to the agreement with the appellant set forth therein. The River Road is not listed as a party and obviously it was not a party when the pamphlet was issued.

This pamphlet conclusively disposes of appellant's assertion that its contract with the River Road on behalf of the latter's trainmen, on which it relies, antedated the Commission's order. The affidavit, dated May 11, 1946, to which the pamphlet is attached recites that it embodies the agreement between the plaintiffs and the River Road, which "has been in effect for several years last past" (R. 155). As pointed out in plaintiffs' statement of the case, which appellant criticizes as inaccurate, the allegation as to when the contract between the appellant and the River Road be-

came effective, contained in the motion to intervene, is that it "has been in effect for several years last past" (R. 136).

The court below made it perfectly plain that in its opinion an order of the Commission could not be affected or modified by a later contract between the River Road and the appellant (Appellant's brief, pages 13-14), yet at no time did the appellant claim in the court below that its alleged contract antedated the order of the Commission. As above shown the record conclusively demonstrates the contrary.

Appellant's criticism (Brief, p. 3) of plaintiffs' statement relative to the Commission's reference to the practice of plaintiffs of moving their cars into and out of the Union Stock Yards over the line of the River Road is unwarranted. There is no question but that plaintiffs did use their own power and crews in making such movements. Neither appellant's motion to intervene nor its pleadings accompanying the motion challenge the fact that the practice was for plaintiffs to move said cars with their own power and crews. As a matter of fact, appellant's motion to intervene admits that this was the practice (R. 136-137). Such was the practice to which the Commission referred and which by condition 3 of the order it directed should be continued.

II.

Replying to Appellant's Contention That as an Indispensable Party It Has an Absolute Right to Intervene.

Appellant (Brief, p. 9) cites authority to the effect that "no court can adjudicate directly upon a person's right without the party being actually or constructively before the Court." Plaintiffs have no quarrel with this statement of the law. A judgment or decree purporting to bind a person not a party or in privity with a party be-

fore the court is a nullity and he need not concern himself with it as he will not be bound. If appellant is an indispensable party, it can ignore the entire proceeding since it will not be bound by any decree therein.

The case of *International Brotherhood* v. *Keystone Freight Lines,* 123 F. (2d) 326, relied on by appellant (Brief, p. 10), has no application to this suit. In that case the plaintiff, a motor carrier, was engaged in a labor dispute with its own employees who were on strike. Connecting motor carriers who customarily interchanged freight with plaintiff were refusing to do so for the reason that their employees, who were members of the union that had called the strike against plaintiff, refused to handle such freight. Plaintiff sued to compel the connecting motor carriers, the union and its members who were their employees to interchange freight with it. The union was denied leave to intervene by the court below. On appeal it was held that the case was moot, but the Court of Appeals said in a *dictum* that the intervention should have been allowed below.

In that case the court's position that the union was the real party in interest is readily understandable. Primarily plaintiff's controversy was with its striking employees, represented by the union, and the purpose of plaintiff's suit was to defeat the strike by compelling the employees of the connecting carriers, also members of the union, to interchange freight with the plaintiff.

Here, however, there is no controversy between plaintiffs and their employees or the employees of the River Road. The only issue is whether the River Road itself shall continue to obey the order of the Commission, as it has been doing for 26 years, or shall now for the first time violate it. So far as plaintiffs and the Commission are concerned, appellant is an utter stranger to that controversy. Neither plaintiffs nor the Commission have any

control over or are in any way concerned with the relations, contractual or otherwise, existing between the employees represented by appellant and the River Road. So far as plaintiffs and the Commission are concerned the real parties defendant are the carriers who have violated the order of the Commission, which both the plaintiffs and the Commission are entitled to have enforced. No rights of the employees represented by the appellant will be adjudicated.

The most that a decree in this suit could do would be to prevent the River Road from specifically performing its alleged contract with appellant. But appellant has cited no authority for the proposition that, if A sues to enforce an obligation of B to A, parties holding subsequent contracts with B, the performance of which by B might be impaired by a judgment in favor of A, have any right to intervene in such an action. If such a principle were admitted, the utmost confusion would result from the intervention of parties whose alleged interest might lie in having B found free from the asserted obligation. The case of *U. S. v. California Canneries*, 279 U. S. 553, 556, cited in plaintiffs' statement in opposition to the jurisdiction of this Court and not referred to by appellant in its brief, is directly in point here. It holds that such parties have no right to intervene.

Section 5 (2) (f) of the Interstate Commerce Act (49 U. S. C. A., Sec. 5 (2) (f)), referred to by appellant (Brief, p. 11), can have no application to this case. That section, which was added to the Act in 1940, some eighteen years after the Commission's order here involved, provides as follows:

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the rail-

road employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It is inconceivable that Congress by this provision intended to permit carriers to nullify, through the medium of collective bargaining agreements, conditions attached to prior orders of the Commission, and a brief examination of the purpose of this section shows that it has no such effect. It directs the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected" when approving a merger, consolidation, lease, etc. This protection is to assure such employees that for a maximum period of four years they will not be in a worse position with respect to their employment than before. But such a provision in a Commission order, unless qualified, would be an invasion of the field normally covered by collective bargaining agreements between the carriers and the authorized representatives of their employees. The last sentence of the paragraph was therefore necessary to forestall the argument that, once the Commission had acted, there was no room for collec-

tive bargaining. The Commission has so applied the section. In prescribing conditions under this paragraph, it has left certain matters to be settled through collective bargaining negotiations. *Texas & P. Ry. Co. Operation*, 247 I. C. C. 285, 296-297.

But, in any event, the language of the last sentence of the paragraph makes it inapplicable to the instant case. The term "said employees" refers to those employees adversely affected in their employment status by action taken under a Commission order entered pursuant to Section 5 (2). Neither the employees of the River Road nor of the Central were affected, adversely or otherwise, by the imposition of condition 3 of the Commission's order. In fact, as pointed out in plaintiffs' statement in opposition to the jurisdiction of this Court, the effect of that condition was to preserve the *status quo* of these employees, as well as that of the employees of the trunk line carriers connecting with the River Road. Clearly therefore Section 5 (2) has no bearing here.

Appellant suggests (Brief, pp. 11-12) that the order of the Commission need not be construed to require the River Road to permit plaintiffs to use their own crews in the operation of their trains here involved and that the Commission's report does not state that empty cars of the plaintiffs "are moved to points of loading" by the plaintiffs. It is contended in effect, therefore, that the order of the Commission needs interpretation and construction and that appellant is entitled to be heard in that connection.

We assert in the first place that appellant's suggestion is frivolous. Whatever the Commission may have said in its report, it ordered the continuation of the practice as it theretofore existed and there never was and cannot now be any doubt as to what that practice consisted of.

In the second place appellant's suggestion comes too late. No such claim was advanced by it in its motion to intervene, or in the accompanying pleadings. On the contrary the motion admitted the existence of the practice. And both the complaint and the intervening complaint also alleged its existence.

We therefore submit that the Court need not concern itself with appellant's suggestion that it is entitled to be heard on the question of interpretation. The suggestion is utterly frivolous and is foreclosed by appellant's position below. And in addition it presupposes an interest entitling appellant to intervene, the very point appellant is attempting to establish.

III.

Replying to Appellant's Contention That a Federal Statute Gives It an Unconditional Right to Intervene.

Appellant insists that Section 17 (11) of Part 1 of the Interstate Commerce Act (49 U.S.C.A., Sec. 17 (11)) confers upon it an unconditional right to intervene, and that this section relates not only to proceedings before the Commission but to suits brought pursuant to the Act. Section 17 (11) provides:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

As originally enacted in 1887, Section 17 (24 Stat. L. 379 at page 385) related only to procedure before the Commission. It has been amended from time to time (25 Stat. L. 861 (1889); 40 Stat. L. 270 (1917); 41 Stat. L. 492 (1920); 47 Stat. L. 1368 (1933)) but, throughout these amendments, it has related exclusively to procedure before the Commission. The last amendment occurred in

1940 (54 Stat. L. 898 *et seq.*) and included, among other changes, the provision above quoted. The Transportation Act of 1940, which carried this amendment, was a long measure making many amendments to the Interstate Commerce Act as a whole, but the subtitle, which preceded the amendments of Section 17, read:

> "Commission procedure; delegation of duties; rehearings" (54 Stat. L. 898 at page 916).

Thus the subtitle of the amendatory act itself limits the scope of Section 17 (11) to proceedings before the Commission. Although it seems unnecessary, we may call attention to the reference to this amendment of Section 17 which is contained in H. R. Report No. 2832, 76th Congress, 3d session, which was a conference report on the Transportation Act of 1940. Discussing the action of the conference, it is said at page 72:

> "Section 13 of the House amendment rewrote section 17 of the Interstate Commerce Act *which deals with the administrative disposition of matters coming within the Commission's jurisdiction.* The revision included matter in sections 204 (e) and 205 (a) which contained provisions dealing with procedural matters under part II of the Interstate Commerce Act relating to motor-carrier proceedings. Such sections 204 (e) and 205 (a) were repealed. Among other things the revised section 17 provided for the assignment of work or functions to an individual commissioner, an examiner, or Board of examiners." (Emphasis ours.)

There is, therefore, no warrant for lifting paragraph (11) out of its context and claiming that it relates to suits in court as well as to proceedings before the Commission.

Appellant appears to admit that 28 U. S. C. A. Section 45a, which it originally relied on, does not confer upon it an unconditional right to intervene.

IV.

Replying to Appellant's Contention That It Is Entitled to Intervene as of Right Under Rule 24 (a) (2) of the Rules of Civil Procedure.

Section 24 (a) (2) provides that upon timely application anyone shall be permitted to intervene in any action "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

As pointed out in plaintiffs' statement in opposition to the jurisdiction of this Court (pp. 14-15), this rule represents a codification of the general doctrines of intervention and presupposes a direct interest in the controversy. Before the question can arise as to whether an applicant's interest is adequately represented by existing parties, he must show such an interest in the suit as under the general doctrines of intervention would entitle him to intervene. If he shows such interest, and then shows that such interest may be inadequately represented and that he may be bound by the judgment, he is entitled to intervene. Since the appellant has shown no such interest in this suit as would entitle it to intervene under the general doctrines of intervention, the question of the adequacy of the representation of its interest does not arise. Furthermore, as previously pointed out, no rights of appellant will be adjudicated in this controversy.

Conclusion.

For the reasons pointed out in plaintiffs' statement in opposition to the jurisdiction of this Court, and for the reasons herein shown, this Court should refuse to entertain the appeal.

Respectfully submitted,

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February 14, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, and WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, and THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF PLAINTIFFS-APPELLEES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, and WABASH RAILROAD COMPANY,
Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF PLAINTIFFS-APPELLEES.

JURISDICTION ON APPEAL

Pursuant to the rules of this Court, plaintiffs-appellees filed a statement opposing the jurisdiction of this Court on this appeal

and a motion to dismiss the appeal for want of jurisdiction. Said motion to dismiss was based upon the claim that appellant had not shown such an interest in the suit as to entitle it to intervene as a matter of right, and that under the decision of this Court in *United States* v. *California Canneries*, 279 U. S. 553, 556, which is based on a long line of prior decisions, the order denying appellant's petition to intervene was not a final and appealable order. On March 3, 1947, this Court entered an order postponing further consideration of the question of its jurisdiction to the hearing on the merits.

Appellant asserts (Br. p. 2) that "Where intervention is asserted as a matter of right, it is well settled that an order denying such intervention is final, and is thus appealable." The cases cited by appellant in support of this statement do not, of course, sustain it, otherwise all that a petitioner to intervene would ever have to do in order to have an order denying the petition reviewed on appeal would be to claim intervention as a matter of right. Presumably what appellant intended to say was that if the petitioner makes such a showing in the court below as entitles him to intervene as of right, then an order denying intervention is appealable. There could be no disagreement with such a statement. The question here is, did appellant make such a showing? If it did not, then the order denying intervention is not appealable. If it did, then it is appealable. It is true that the decision of the question of the appealability of the order thus involves a decision on the merits of the appeal. But such fact would not seem to make a motion to dismiss for want of jurisdiction improper, since the motion affords this Court and the parties involved a possible opportunity to avoid delay in determining the issue raised by the appeal. *Allen Calculators* v. *National Cash Reg. Co.*, 322 U. S. 137, 142.

This brief is therefore a reply to appellant's contention (Br. p. 37) that the application of the Brotherhood to intervene, as

a matter of right, should have been granted. If appellant's position is not sustained, it cannot in the present status of this case make any material difference to plaintiffs-appellees whether this Court dismisses the appeal for want of jurisdiction or affirms the order of the court below denying intervention.

STATEMENT OF THE CASE

Inasmuch as appellant's statement of the case is incomplete and misleading and wholly inadequate to an understanding of the questions raised by its appeal, it is deemed necessary to make a full statement of the case here.

The Complaint of Plaintiffs-Appellees (R. 1-46)

As shown by the allegations of the complaint herein (R. 1-12), this is a suit under paragraph (12) of Section 16 of Part I of the Interstate Commerce Act (49 U.S.C.A. Sec. 16, par. 12) (R. 3) for the purpose, among others, of enjoining disobedience of a condition in an order of the Interstate Commerce Commission (hereinafter called the Commission) entered May 16, 1922, in the *Chicago Junction Case*, 71 I.C.C. 631.

Plaintiffs-Appellees (hereinafter referred to as "plaintiffs") are eight trunk line carriers engaged, *inter alia*, in the transportation by railroad of carload shipments of livestock, other than hogs and sheep, from the Union Stock Yards, Chicago, Illinois, to destinations east and southeast of Chicago (R. 2, 3).

Defendants-Appellees (hereinafter referred to as "defendants") are The New York Central Railroad Company (herein called the Central), The Chicago River and Indiana Railroad Company (herein called the River Road), and Chicago Junction Railway Company (herein called the Junction) (R. 2).

The Central is a trunk line carrier engaged, *inter alia*, in the same transportation as that of plaintiffs above referred to. The River Road is a switching line serving the Union Stock Yards, all of the capital stock of which is now owned and was acquired by the Central on May 19, 1922, pursuant to authority granted by said order of May 16, 1922, on certain conditions. The Junction is a railroad company which on May 16, 1922, and on the same conditions, leased its entire railroad to the River Road for 99 years, and thereafter, at the option of the lessee, in perpetuity, which lease is still in effect (R. 3–5).

Said order of May 16, 1922, was entered on an application filed by the Central with the Commission on December 28, 1920, for approval, *inter alia*, of the following proposed transactions (R. 13):

> "(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;
>
> "(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity."

The report and order of the Commission (R. 12–37) entered on said application approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows (71 I.C.C., p. 650):

> "That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be

deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive." (R. 36.)

The conditions so referred to included the following condition (71 I.C.C., p. 639):

> "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central." (R. 22.)

After having enumerated the foregoing conditions in said report, the Commission made the following finding (71 I.C.C., p. 641):

> "*Subject to the observance of the above conditions, we find that the acquisition* by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction *will be in the public interest.*"* (R. 25.)

On December 3, 1928, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case* (150 I.C.C., pp. 32–38) in which it amended condition 14 of its report and order of May 16, 1922, but said amendment is in no way pertinent to any issue in this case. As so amended said report and order of May 16, 1922, are still in full force and effect (R. 5).

On January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding entitled "*The Baltimore & Ohio Railroad Company, et al.* v. *United States of America, et al.*, In Equity No. 3427," in which all of the plaintiffs herein or their respective predecessors

---

*Italics ours throughout unless otherwise indicated.

in interest and all of the defendants herein were parties, entered a final decree with respect to said order of May 16, 1922, by which it found and decreed as follows:

> "* * * and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties." (R. 5–6, 16.)

From May 20, 1922, to the present time the Central has had and now has control of the traffic and operating relationships existing between the Junction and the River Road on the one hand and the plaintiffs, respectively, on the other hand (R. 6).

On May 16, 1922, and for many years prior thereto, plaintiffs moved empty livestock cars used for the loading of livestock, other than hogs and sheep, *with their own power and crews* from their respective lines, via their respective connections with the line of the Junction now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of loading *with their own power and crews* over said line to its connections with their respective lines and thence to destinations as consigned and routed by the shippers (R. 3).

Referring to this operating practice the Commission, in its report accompanying the order of May 16, 1922, said (71 I.C.C. p. 633):

> "All parties concede that that is the only practical method of handling that traffic." (R. 15.)

For the privilege of so moving said cars plaintiffs, respectively, on and immediately prior to May 16, 1922, and continuously thereafter to February 1, 1946, paid the River Road and the River Road accepted $1.00 per car, loaded and empty (R. 3).

On or about January 25, 1946, the Central and the River Road notified plaintiffs that on and after February 1, 1946, plaintiffs would not be permitted to move said stock cars as aforesaid, and that such cars when destined to places of loading on the line of the River Road in said Union Stock Yards would be moved by the power and crews of the River Road from the points of interchange with plaintiffs, respectively, on the line of the River Road to such places of loading and after they had been loaded at such places of loading by shippers, would be moved thence by the power and crews of the River Road to the points of interchange with plaintiffs, respectively, on the line of the River Road, and that at such points they would be delivered by the River Road to the plaintiffs, respectively, and that the charge of the River Road for such handling would be $12.96 per outbound loaded car instead of the charge of $1.00 per car loaded and empty, theretofore charged to and paid by the plaintiffs (R. 6–7).

On and after February 1, 1946, the Central and the River Road proceeded to act in accordance with said notice and this suit was brought by the plaintiffs on February 12, 1946, to compel obedience by the defendants to Condition 3 in said order of May 16, 1922, it being alleged that the aforesaid action of the defendants pursuant to said notice of January 25, 1946, was in violation of said condition (R. 7–12).

Intervention by the Commission (R. 47-49)

On February 21, 1946, pursuant to leave of court, the Commission filed its complaint of intervention (R. 47). The complaint of the Commission alleged that the action of the Central and the River Road in making the changes in operation which are above outlined "constituted and was discontinuance in part of 'the present traffic and operating relationships existing between the Junction and River Road' and the plaintiffs herein, and was and is in violation of the order of the Interstate Commerce Commission of May 16, 1922." The complaint further

alleged that by Section 5 (8) of the Interstate Commerce Act (49 U. S. Code Sec. 5 (8)) the Commission was authorized to seek, and the District Courts of the United States were given jurisdiction to afford, injunctive or mandatory relief to restrain violation of or compel obedience to an order issued under Section 5 of that Act. Preliminary and permanent injunctions were asked "restraining and enjoining the defendants and each of them, their respective officers, agents, representatives, servants, employees and successors from (a) failing and neglecting to obey said order of the Commission of May 16, 1922; (b) violating condition 3 of said order of the Commission of May 16, 1922." (R. 48.)

Stipulation of Facts (R. 50-57)

Plaintiffs, defendants and the Commission entered into a stipulation of facts to be considered as evidence in the cause on the hearing on the motions of the plaintiffs and the Commission for a preliminary injunction, which facts were to be taken as true and binding on the parties except that objections might be made to the relevancy and materiality thereof. The stipulation of facts admitted as true the facts above outlined from the allegations of the complaint (R. 50-55). Said stipulation of facts also recited that the Brotherhood of Railroad Trainmen (appellant herein), bargaining agent under the Railway Labor Act for River Road trainmen, having failed to settle certain disputes—among others a demand, claimed by said Brotherhood to be based upon a contract with the River Road, that River Road trainmen be given the work of moving and switching the live-stock cars hereinabove referred to—notified the River Road, under authority of an almost unanimous strike vote of said trainmen, that unless said disputes were settled before 10:30 P.M., January 23, 1946, River Road trainmen would go out on strike at that hour. Under continued threat of such a strike the River Road shortly before the hour set for said strike made an agreement with said Brotherhood which, among other things,

provided that said work of moving and switching livestock cars be given to River Road trainmen. Said stipulation further recited that J. L. McKee, Vice President of the River Road and of the Central, participated in the negotiations with the Brotherhood and signed the foregoing agreement as Vice President of said railroads (R. 55–56).

The Preliminary Injunction (R. 58–67)

On March 14, 1946 (R. 58), the court below made findings of fact and conclusions of law and entered a preliminary injunction, pending the further order of the court, enjoining the defendants, "their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with them," from failing and neglecting to obey said order of May 16, 1922, with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards, and from violating Condition 3 of said order in the like respect, and commanding them to permit plaintiffs to move their said cars over the line of the River Road as had been the practice prior to February 1, 1946 (R. 65–66).

Thus the form and scope of the injunction followed substantially paragraph (d) of Rule 65 of the Rules of Civil Procedure for District Courts of the United States, which provides that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The court held as a conclusion of law that the Commission's report and order of May 16, 1922, was and is valid and binding on the defendants, that the change in operating arrangements, as above outlined, brought about by the defendants on February 1, 1946, constituted a discontinuance of traffic and operating relationships existing on or prior to May 16, 1922, between

the Junction and the River Road on the one hand and the plaintiffs on the other hand, within the meaning of said order of May 16, 1922, and was and is a violation of said order and Condition 3 thereof, and that the defendants and each of them were responsible for such discontinuance and were and are parties to such violation and were and are participants in such disobedience. The court also held that the facts stipulated, as above set forth, relative to the dispute between the appellant and the River Road and the agreement between them settling the same, were irrelevant and immaterial (R. 65).

The court also ordered that the motion of the Junction to dismiss the suit as to it be continued until the final hearing (R. 67).

Appeal of Chicago Junction

While the matter is of no particular importance here, brief reference to the appeal of the Chicago Junction is probably not inappropriate, since it is referred to in appellants' brief (p. 11). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the Junction contended that the court below lacked jurisdiction of the subject matter of the action in so far as it related to the Junction; that Condition 3 of the order of May 16, 1922, did not apply to the Junction; that the complaint failed to state a claim against the Junction upon which relief could be granted; and that the court should reverse the decree of the court below and order the suit dismissed as to it. The Circuit Court of Appeals held that the District Court had jurisdiction of the suit, but that inasmuch as, on the stipulation of facts and the court's findings of fact, the Junction had no control over and nothing to do with the acts complained of by the plaintiffs, the preliminary injunction should not have issued against it. It further held that it could not properly pass upon the Junction's motion to dismiss the case as to it until the court below had passed upon it, and that the court below did not err in withholding its decision on that motion until the final hear-

ing. *Baltimore & O. R. Co. v. Chicago Junction Ry. Co.*, 156 F. (2d) 357.

Motion of Appellant for Leave to File Special Appearance, Etc. (R. 67-72)

On March 18, 1946 (R. 67), the appellant, by motion, asked leave of court to appear specially and not generally for the purpose of moving the court to vacate the temporary injunction and to dismiss the suit for failure to join as parties defendant the yard employees of the River Road or the appellant as their representative, who were alleged to be indispensable parties. This motion was denied by order entered March 19, 1946 (R. 67).

Attached to the motion which appellant proposed to file if leave to appear specially were given, was an affidavit by William Bishop, Vice President of appellant, and Felix E. Kazmer, General Chairman of the appellant for the River Road (R. 69), in which it is alleged that the appellant, as a bargaining representative of the River Road, had entered into an agreement with the River Road "which is now and *has been in effect for several years last past*, [and] is entitled 'Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement.'" (R. 70.) The affidavit quotes certain provisions of said Chicago Memorandum of Agreement, which it is alleged have the effect of giving all yard work on the River Road to its yardmen (R. 71), and then alleges that "sometime ago a controversy arose" between the River Road and its yardmen, with particular reference to the handling of certain yard work by employees of other railroads on the River Road's tracks (R. 71), and that on January 23, 1946, this controversy was settled by a written interpretation of said Agreement, which "settlement interpretation is that referred to in paragraph 15 of the Stipulation of Facts heretofore filed by the parties herein" (R. 71-72). The affidavit further alleges that "the complaint in the present proceeding seeks to nullify such settlement interpretation and to give such yard work" to other

railroads, and that "In the event the Chicago River and Indiana Railroad Company fails to give yard work to its yard employees in accordance with said Chicago Memorandum of Agreement and the settlement interpretation of January 23, 1946, such failure may result in claims by such employees against said railroad company for money damages and other relief." (R. 72.)

Answer of the River Road and the Central (R. 81-87)

On May 6, 1946 (R. 81), the River Road and the Central filed a sworn answer (R. 87) in which, among other things, they denied that they or either of them "have violated condition 3 or any other part of the report and order of the Interstate Commerce Commission of May 16, 1922," and denied "that Condition 3 * * * is applicable to or imposes any duty upon the defendant, River Road." (R. 84.)

The answer further alleges that the River Road yard trainmen, for the purposes of the Railway Labor Act (Title 45 U.S.C.A. Sec. 151, et seq.), are represented by the appellant; that prior to January 1946 appellant made demands, allegedly based on said Chicago Memorandum of Agreement, that the work connected with the switching and spotting of stock cars on the tracks of the River Road be performed exclusively by River Road employees, which demands the River Road denied were supported by said Agreement; that in January 1946 a strike ballot was submitted by appellant to trainmen employed by the River Road to vote for or against a strike if their alleged grievances, including their claim to do said work, were not satisfactorily settled; and that appellant subsequently informed the River Road that its trainmen had voted almost unanimously in favor of the strike. (R. 84–85.)

The answer further alleges (R. 85–86):

> "* * * By letter, dated January 21, 1946, William Bishop, a Vice President of said Brotherhood, advised the River

Road that a strike of its trainmen would commence at 10:30 P. M. on Wednesday, January 23, 1946, unless the River Road made settlement of the aforesaid grievances before that time. The River Road immediately sent such information to the Secretary of the National Mediation Board. On January 23, 1946, the River Road received a telegram from the Secretary of the National Mediation Board stating that the President of the United States had that day created an emergency board to investigate the disputes on the River Road with certain of its employees represented by the Brotherhood of Railroad Trainmen. Subsequently on January 23, 1946, the aforesaid William Bishop advised the River Road that the strike would proceed as planned notwithstanding the action of the President of the United States aforesaid."

The answer further alleges that on the evening of January 23, 1946, a conference was had between officials of the appellant and officers of the River Road during which said William Bishop stated that unless certain demands, including the demands with respect to the switching and spotting of cars on the tracks of the River Road, were met before 10:30 P. M. on said date, not only the trainmen employed by the River Road would strike, but employees of other railroads operating in Chicago would probably strike within 8 hours after such time. It is further alleged that appellant's "officials refused to settle their demands on any basis which would permit the River Road to allow crews of railroads other than the River Road to move live stock cars used for the loading of live stock (other than hogs and sheep) to the place of loading on the lines of the River Road and to move such cars away from such places after loading." (R. 86.)

The answer alleges that at approximately 9:50 P.M. on January 23, 1946, an agreement was entered into conceding appellant's demands, which agreement was made solely to prevent a threatened strike, and that as a result of the agreement the strike was called off by appellant a few minutes before it

was to begin (R. 86). A copy of said settlement agreement is attached to the answer as an exhibit (R. 88–90).

Appellant's Petition to Intervene (R. 90-98)

On May 20, 1946 (R. 90), appellant presented to the court below its petition to intervene. This appeal has been taken from the order of that court denying said petition, which was entered November 7, 1946 (R. 137). The petition alleges that appellant is the bargaining representative of the trainmen employed by the River Road and that the petition is made as such representative. It further alleges in substance that under a contract, said Chicago Memorandum of Agreement, made by the appellant with the River Road on behalf of the latter's trainmen, those trainmen are entitled to all the work performed by trainmen on the River Road lines, including the work that has heretofore been done by employees of the plaintiffs over the line of the River Road.

The petition does not allege definitely when said agreement was entered into, except that the contract "has been in effect for several years last past." (R. 90.) In the affidavit of Felix E. Kazmer, General Chairman of appellant for the River Road, attached to the pleading of the appellant accompanying its petition to intervene (R. 102), it is also alleged that the agreement "has been in effect for several years last past" and that "a true copy of this Agreement is attached hereto, marked 'Exhibit A' and made a part hereof." (R. 102.) The date of Exhibit A (R. 106–126), which is a printed pamphlet, is not shown, but inasmuch as page 2 thereof (R. 107) makes reference to rates of pay effective October 1, 1937, it is apparent the pamphlet could not long have antedated, and probably postdated October 1, 1937. Page 1 of the pamphlet (R. 106) lists the railroads who were parties to the agreement with the appellant set forth therein. The River Road is not listed as a party and obviously it was not a party when the pamphlet was

issued. The record does not show when it became a party to the agreement, but manifestly it was after October 1, 1937.

Particular attention is called to this matter because of the following statement in appellant's brief (p. 7):

> "The River Road trainmen base their claim to this work, first, on their original collective bargaining agreement signed December 20, 1919, (R. 118) providing that they shall handle all 'yard work' on their employer's line (R. 108–109) and second, on a 'settlement interpretation' of this agreement dated January 23, 1946, specifically providing that they shall handle the switching and spotting of all outbound stock car movements (R. 88).

The implication of this statement is that the agreement was signed by the River Road and the appellant on December 20, 1919, and that the alleged contract rights of the River Road trainmen under it originated at that time. However, neither the petition to intervene nor any affidavit of the Brotherhood officials filed in this suit states the date the agreement was entered into between appellant and the River Road. Just what railroads were parties to the agreement when it was originally signed in December 1919 does not appear, nor does it appear when any of the railroads shown to be parties to it on said Exhibit A became parties. But said Exhibit A conclusively proves that the River Road did not become a party to the agreement until on or after 1937, and the allegations of the petition to intervene and of the various affidavits filed by the Brotherhood officials to the effect that the agreement "has been in effect for several years last past" are manifestly made in view of this fact.

The petition to intervene further alleges that appellant on behalf of the River Road trainmen "for some time" protested to the River Road over the failure of the River Road to permit its trainmen to do the work heretofore done by employees of the plaintiffs over the lines of the River Road (R. 91) and that on January 23, 1946, the River Road made a settlement with the appellant to the effect that the River Road's trainmen should

do that work, which settlement took the form of a "written interpretation" of said agreement.

The petition asserted appellant had the right to intervene because (1) it was an indispensable party, and (2) because Rule 24 (a) of the Rules of Civil Procedure for the District Courts of the United States gave it such right (R. 93–94).

The right to intervene under Rule 24 (a) was claimed because (1) 49 U.S.C.A. Sec. 17 (11) gave appellant an unconditional right to intervene, and (2) representation of appellant's interest by the defendants was inadequate (R. 94). Representation of appellant's interest by the defendants was alleged to be inadequate because (1) plaintiffs sought to relieve defendants of their obligation under the settlement agreement and the interests of the plaintiffs and the defendants were common and adverse to the appellant (R. 94); (2) defendants did not oppose the intervention of the Commission in the suit, which intervention was alleged to be inappropriate for various specified reasons (R. 94–95); (3) defendants did not file an answer until May 6, 1946 (R. 95); (4) defendants called no witnesses in opposition to the application for a preliminary injunction but contented themselves with signing a stipulation of facts which was wholly inadequate to indicate to the court that the suit grew out of a labor dispute and that any action of the court must be in compliance with the laws relating to labor disputes (R. 95); (5) defendants did not invite the court's attention to 29 U.S.C.A. Secs. 51–53 (the Clayton Act), to 29 U.S.C.A. Secs. 101–115 (the Norris-LaGuardia Act), to certain decisions relating to injunctions in labor disputes and which it was alleged would require dismissal of the complaint, nor to 49 U.S.C.A. Sec. 5 (2) (f) (R. 95); (6) defendants allegedly made no formal objection to the preliminary injunction even though the findings of fact and conclusions of law constituted a decision of the case on the merits; (7) defendants had failed to take any action to force the plaintiffs to make the appellant a party.

The petition to intervene also alleged that appellant should be permitted to intervene under Rule 24 (b) of the Rules of Civil Procedure (R. 97) but this point was abandoned by appellant (R. 155).

Attached to the petition to intervene was a motion by appellant to vacate the preliminary injunction, to assess damages against the plaintiffs and for summary judgment, with reference to which the motion to intervene stated:

> "This pleading sets forth the present claim or defense for which intervention is sought." (R. 97.)

The so-called pleading accompanying the petition to intervene (R. 99–102) contained (1) a motion to vacate the preliminary injunction for failure (a) to make employees of the River Road or their representative a party to the suit, and (b) to comply with the provisions of the Norris-LaGuardia Act (29 U.S.C.A. Secs. 101–115) or the provisions of the Clayton Act (29 U.S.C.A. Secs. 51–53) relating to injunctions in labor disputes; (2) a motion to assess damages against the plaintiffs for the wrongful and improvident issuance of the injunction; and (3) a motion for summary judgment in favor of appellant (a) for lack of jurisdiction over the subject matter due to the failure to join River Road employees or their representative, alleged to be indispensable parties, and (b) for failure to state a claim upon which relief could be granted because the complaint did not satisfy the requirements of the Norris-LaGuardia Act or the Clayton Act, did not allege a violation of the order of the Commission or, if it did, the court should not enjoin violation of the order, because the Commission did not have jurisdiction to enter the same, 49 U.S.C.A. Sec. 5 (2). (f) was applicable, and the public interest required that no injunction be issued.

After the court had denied its petition to intervene, appellant filed a motion to amend said petition by adding thereto the allegation that 28 U.S.C.A. Section 45a gave it an unconditional right to intervene (R. 138–140). This motion was denied (R. 138).

QUESTION PRESENTED BY THE APPEAL

The question presented by this appeal is whether appellant by its petition to intervene and the accompanying motion has alleged facts which entitle it to intervene as a matter of right. Appellant contends that it is entitled to intervene as a matter of right because (1) it is an indispensable party, (2) two federal statutes give it an unconditional right to intervene within the meaning of Rule 24 (a) (1) of the Rules of Civil Procedure, and (3) Rule 24 (a) (2) of said rules gives it such right.

As will presently be demonstrated, appellant's claim that it is entitled to intervene as of right because it is an indispensable party is wholly without foundation. In order to prevail on this appeal appellant must establish the proposition that it has shown such an interest in the issue raised by the suit that the court ought not to proceed without allowing it to become a party. To answer that, resort must be had to Rule 24 (a) (1) and (2) of the Rules of Civil Procedure which is as follows:

> "Rule 24. Intervention.
>
> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Accordingly the questions to be answered are (1) do either of the two United States statutes referred to by appellant give it an unconditional right to intervene, or (2) would or might appellant be bound by a judgment in this cause and (if so) is or might the representation of appellant's interest by existing parties be inadequate.

SUMMARY OF ARGUMENT

I.

Appellant's claim that it is entitled to intervene because it is an indispensable party is wholly without foundation. An indispensable party is one without whom the court cannot proceed. The absence of an indispensable party is an objection taken only by a party defendant or the court on its own motion. An indispensable party is not concerned with a suit to which he is not a party. The subject of indispensable parties and the subject of intervention raise totally different problems and should not be confused.

II.

All intervention is founded on interest. Rule 24 (a) (2) of the Rules of Civil Procedure providing for intervention as of right in certain cases presupposes a direct interest in the suit and that intervention is necessary for the protection of such interest. The interest must be that created by a claim to the demand or some part thereof in suit, or a lien upon the property or some part thereof in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.

III.

Appellant has shown no such interest as entitles it to intervene as of right because its claim is based upon an alleged contract with the River Road which is necessarily subordinate to the order of the Commission and the rights of the plaintiffs and the public to have such order enforced. That order was entered primarily in the public interest and in a matter over which Congress has given the Commission exclusive jurisdiction. The order was entered and decreed to be valid and binding upon all the plaintiffs and all the defendants herein long before the alleged contract between the appellant and the River Road came into existence and any rights created by that contract are ne-

cessarily subordinate to rights created by the order. Even had the contract antedated the order, the order must nevertheless prevail because the constitutional power of Congress to regulate interstate commerce may not be hampered or restricted by prior contracts between private parties.

IV.

Appellant's petition to intervene with its accompanying motion to dissolve the preliminary injunction, assess damages against the plaintiffs and dismiss the suit amounts in substance to a collateral attack upon the order of the Commission which will not be permitted.

V.

If appellant as a representative of the River Road trainmen has a legitimate ground for complaint against the order it has available to it both a judicial and an administrative remedy. It may sue in a court of three judges under 28 U.S.C.A. Section 47 to set aside the order or it may apply to the Commission to reopen the proceedings in which the order was made and modify it.

VI.

Neither the petition to intervene nor the accompanying pleadings allege facts which show that the River Road trainmen will sustain any loss as a result of the enforcement of the operating rights of plaintiffs over the railroad of the River Road. On the contrary they show that those trainmen have an adequate remedy against the River Road for any loss which they may sustain through the enforcement of the order, which remedy will not be affected by any decree in this suit.

VII.

If it be assumed, *arguendo*, that appellant has a valid contract with the River Road, such fact would not entitle it to in-

tervene even though the incidental effect of a decree enforcing the order of the Commission would prevent the River Road from specifically performing its alleged contract with the appellant. Such decree would not deprive the River Road trainmen of any rights which they might have against the River Road for breach of their alleged contract. Neither the meaning nor the validity of that contract is in issue. Appellant has cited no authority holding that if A sues to enforce an obligation of B, parties holding contracts with B, the performance of which by B might be impaired by a judgment in favor of A, have any right to intervene in such action. On the other hand, this and other federal courts have squarely held that in such a situation parties holding contracts with B may not intervene.

VIII.

The mere fact that injunctive relief was asked and granted against the employees of the River Road does not establish that they have an interest in the suit. The injunction runs against such employees solely for the purpose of preventing the River Road from doing through them as its agents the things the River Road itself is enjoined from doing. The right of a court to enjoin the agents and employees of a party without such agents and employees being made parties to the suit is elementary law fully recognized by Rule 65 (d) of the Rules of Civil Procedure and the decisions of this and other federal courts.

IX.

If appellant has any interest in this suit which would otherwise entitle it to intervene as of right, such interest is being adequately represented by the defendants. The alleged failure of the defendants to call the Norris-LaGuardia Act to the attention of the court does not show that appellant's interests are not being adequately represented by the defendants. The Norris-LaGuardia Act has no application to this suit because (1) the suit does not involve and did not grow out of a labor dis-

pute, (2) a fundamental rule of statutory construction forbids the application of that Act to this suit, and (3) the Act is not applicable to the United States which, acting through the Interstate Commerce Commission, is asking for the enforcement of the order.

Section 5 (2) (f) of the Interstate Commerce Act has no application to any issue in this suit and the alleged failure of the defendants to call it to the attention of the court does not indicate that their defense to the suit will be inadequate. Defendants' answer has raised all possible defenses to the suit on the merits. Appellant's suggestions as to matters involved in a defense of the suit on the merits are frivolous and were not made in the court below.

X.

No statute of the United States gives the appellant an unconditional right to intervene. Section 17 (11) of Part I of the Interstate Commerce Act is not applicable because it refers exclusively to proceedings before the Commission. In addition it requires a showing of interest. The applicability of 28 U.S.C.A. Section 45a is doubtful, and it also requires that an interest be made to appear.

ARGUMENT

I.

APPELLANT'S CLAIM THAT IT IS ENTITLED TO INTERVENE BECAUSE IT IS AN INDISPENSABLE PARTY IS CLEARLY UNTENABLE.

Appellant cites a number of cases (Br. p. 18) which discuss the question of who is an indispensable party. But in each of

those cases the question of whether an indispensable party had not been made a party was raised by those who were already parties to the suit and not by someone seeking to intervene on the ground that he was indispensable. In *Shields* v. *Barrow*, 58 U. S. 129, which is perhaps the leading case on the question, this Court, referring to indispensable parties, said (p. 144):

> "* * * If the interest of the defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispensable party is not on the records, it refuses to proceed. These remedies cover the whole subject, * * *."

Thus, as stated by this Court, a defendant may raise the question that his interest requires the presence of other parties who are indispensable and the complainant is forced to amend his bill and bring them in or the bill is dismissed. Or the court at the hearing may find that an indispensable party is not a party and refuse to proceed without such party. These remedies cover the whole subject of indispensable parties.

Obviously this is so since the very idea of an indispensable party is one without the presence of which the court cannot proceed. Manifestly an indispensable party need not be concerned with the suit since the court will not proceed without him. These considerations explain why appellant is unable to cite any case where a party has been permitted to intervene upon the ground that he is indispensable.

The question of who is entitled to intervene in a suit relates to a totally different problem and should not be confused with the question of who is indispensable. This is shown by the fact that the Rules of Civil Procedure dealing with the question of intervention make no reference to the subject of indispensability.

II.

IN ORDER TO BE ENTITLED TO INTERVENE AS OF RIGHT, PETITIONER MUST SHOW A DIRECT INTEREST IN THE LITIGATION AND THAT INTERVENTION IS NECESSARY FOR THE PROTECTION THEREOF.

It is well established that Rule 24 (a) of the Federal Rules of Civil Procedure giving an absolute right to intervene in certain cases presupposes a direct interest in the issues. As the courts and text writers have consistently pointed out, this was the case when intervention was governed by former Equity Rule 37, and Rule 24 (a) merely continues in effect Rule 37.

In *Pipe Line Co.* v. *U.S.*, 312 U.S. 502, this Court, in an opinion by Mr. Justice Frankfurter, at page 508, characterized Rule 24 (a) as containing "the *codification* of general doctrines of intervention." That Rule 24 (a) embodies or is to be interpreted in the light of former general principles of intervention is clearly indicated by the following statement from the opinion of this Court by Mr. Justice Roberts in *Vinson* v. *Washington Gas Co.*, 321 U.S. 489 (p. 498):

> "* * * One of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding."

In 6 Cyclopedia of Federal Procedure (2nd Edition) it is said (p. 477):

> "It is altogether in order to emphasize at the outset, before undertaking a more detailed analysis of Rule 24(a), that *it introduces no innovation, in so far as the absolute right to intervention under certain circumstances is concerned.*"

And discussing the right to intervention under Equity Rule 37, it is said (p. 479):

> "Such right of intervention was absolute where the petitioner *had direct interest* in the litigation and subject-mat-

ter thereof and such intervention was necessary for its protection."

It is further said (p. 480):

"In alluding to the matter of 'interest' in connection with intervention, one's conclusions should be prefaced by the observation that, historically and otherwise, all intervention is grounded in 'interest.' It has been said most appropriately that the requirement that there be an 'interest' merely reflects the 'orthodox prerequisite to judicial aid in any sort of proceeding: the establishment of an injury for which the law will give relief.' "

and again (p. 482):

"Although Rule 24 does not say so in terms, it goes without saying that it presupposes in one intervening a direct interest in the case at bar. Rule 24(a) (2) refers to the representation of the applicant's 'interest' by 'existing parties,' and Rule 24(a) (3) assumes the possibility of being adversely affected by a distribution or other disposition of property in the court's custody. In the last analysis this is nothing more than a continuation of a basic general rule of intervention, and in view of the fact that Rule 24 *merely amplifies and states the pre-existing federal practice at law and in equity*, it is essential to give consideration to general authorities dealing with *this basic element of intervention*."

In *Babcock* v. *Town of Erlanger*, 34 F. Supp. 293 (Dist. Ct., E.D., Ky.), the court, referring to Rule 24 (a), said (p. 295):

"This rule amplifies and *restates* both at law and in equity the federal practice at the time of its adoption. Washington Institute on Federal Rules, page 67.

"The cases prior to the adoption of the rule are therefore in point on this question."

To the same effect is *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of America*, 7 Fed. Rules Serv. 460 (Dist. Ct., W.D. Va.).

In *Smith* v. *Gale*, 144 U.S. 509, this Court said (p. 518):

> "To authorize an intervention, therefore, *the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.*"

We shall now show that appellant has wholly failed to state facts which establish such an interest as is necessary to permit it to intervene as of right.

III.

APPELLANT HAS NO SUCH INTEREST AS ENTITLES IT TO INTERVENE AS OF RIGHT FOR THE REASON THAT ITS CLAIM IS BASED UPON AN ALLEGED CONTRACT WITH THE RIVER ROAD WHICH IS NECESSARILY SUBORDINATE TO THE ORDER OF THE COMMISSION.

A.

The River Road could not through a purported contract with Appellant create any rights in its trainmen which would nullify or render unenforceable the antecedent order of the Commission.

As pointed out, *supra*, page 14, the River Road did not become a party to the Chicago Memorandum of Agreement, which formed the original basis of appellant's claim and which was "interpreted" by the settlement agreement between appellant and the River Road entered into on January 23, 1946, until 1937 or after, or at least fifteen years after the Commission's order of May 16, 1922.

Not only did the order of May 16, 1922, long antedate any alleged agreement between appellant and the River Road but the order was adjudicated valid and binding on the River Road long before the River Road became a party to any agreement

with the appellant. It is alleged in the sworn complaint of the plaintiffs herein (R. 5, 6, 12), stated as a fact in the stipulation of facts entered into by the plaintiffs, the Commission and the defendants (R. 54), found by the court below as a fact (R. 61–62), and nowhere questioned by the appellant in its motion to intervene or other documents filed by it in the court below or in its brief in this Court, that on January 15, 1929, the District court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding entitled *The Baltimore & Ohio Railroad Company, et al.* v. *United States of America, et al.*, In Equity No. 3427, to which proceeding all of the plaintiffs herein, or their respective predecessors in interest, and all of the defendants herein were parties, entered a final decree, by which that court found and decreed with respect to said order of May 16, 1922, as follows (R. 46):

> "* * * and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties."

As a part of its records, the court below will take judicial notice of said decree, *United States* v. *Pink*, 315 U.S. 203, 216, and in reviewing the action of the court below, this Court will likewise take judicial notice thereof. *United States* v. *Pink*, *supra*, page 221; *Adam* v. *Saenger*, 303 U.S. 59, 63; *Hanley* v. *Donoghue*, 116 U.S. 1, 16.

Thus any question as to the validity of the order is by reason of said final decree of January 15, 1929, *res judicata* as to the River Road and its privies, including appellant, whose claim is based upon a subsequent contract with the River Road. *Johnson Co.* v. *Wharton*, 152 U.S. 252, 257; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352.

The duties imposed by Condition 3 of the Commission's order are duties imposed not only for the benefit of the plain-

tiffs but in the public interest, pursuant to the authority granted the Commission under the Interstate Commerce Act. The order of the Commission which authorized the Central to acquire all the stock of the River Road, and the River Road to acquire by lease the properties of the Junction, was issued pursuant to paragraph (2) of Section 5 of the Interstate Commerce Act, which at the time of the entry of the order provided (49 U.S.C.A. Sec. 5 (2)):

> "Acquisition of control of one carrier by another. Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either *under a lease or by the purchase of stock* or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, *will be in the public interest*, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and *on such terms and conditions* as shall be found by the commission to be just and reasonable in the premises."

In *N.Y. Central Securities Co.* v. *United States*, 287 U.S. 12, this Court sustained the constitutionality of the above provision and upheld an order of the Commission authorizing the lease by the New York Central Railroad Company of the railroad systems of the Big Four and Michigan Central companies. Speaking of the criterion by which the Commission was to be guided in the exercise of the authority conferred upon it by section 5 (2), this Court said (p. 24):

> "* * * *That criterion is the 'public interest.'* It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context in the provision in question show the contrary. Going forward from a policy mainly directed to the

prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case*, 261 U.S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery, were created.' The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs of the public,' 'the necessity of enlarging transportation facilities,' and the measures which would *'best promote the service in the interest of the public and the commerce of the people.'* Id. p. 189, note. See, also, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to *adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

In *Texas* v. *United States*, 292 U.S. 522, this Court, in speaking of the policy of the Act, said (p. 530):

"* * * It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the *maintenance of service, is viewed as a direct concern of the public. Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—*is that of the controlling public interest.* And that term as used in the

> statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.'"

Prior to enumerating the conditions in its report, the Commission said with reference to them (R. 22):

> "* * * others suggest themselves from the standpoint of an administrative body, as necessary in order to *safeguard the public interest* in the future."

After enumerating the conditions, the report of the Commission continued (R. 25):

> "*Subject to the observance of the above conditions*, we find that the acquisition by the Central of the capital stock of the River Road and the *leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.*"

The obligations imposed on the defendants by Condition 3 of the order were thus unquestionably obligations imposed by the Commission in the public interest.

Obligations imposed by the Commission in the public interest may not be terminated by a court. It was squarely so decided in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134. This Court there held that, in a reorganization proceeding under Section 77 of the Bankruptcy Act, the question of whether a trackage agreement between the bankrupt and another railroad company should be continued or terminated should not be decided by the court but should be left to the discretion of the Commission. This Court said (p. 143):

> "The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not

only the interests of the two parties to the trackage agreement but *phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted.*"

Referring to the Interstate Commerce Act, this Court further said (p. 147):

> "But Section 5 (2) (a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. *The jurisdiction of the Commission is exclusive.* * * * It is the function *of the Commission* to determine the terms and conditions under which trackage rights are acquired."

The operating rights of the plaintiffs over the line of the River Road are in substance trackage rights. The continuation of those rights and the terms and conditions upon which they are to be exercised are subjects left to the determination of the Commission. Even a court has no authority to interfere with the prerogatives of the Commission in such matters. Manifestly the River Road could not by any contract which it might execute create rights in itself or in its employees which would interfere with the exercise by the plaintiffs of rights theretofore conferred upon them by the order of the Commission.

Appellant apparently contends (Br. p. 35) that Section 5 (2) (f) of the Interstate Commerce Act affords some justification for the alleged contract between it and the River Road, which is so clearly in direct conflict with the order of the Commission. That section, which was added to the Act in 1940, some eighteen years after the Commission's order here involved, provides as follows 49 U. S. C. A., Sec. 5 (2) (f):

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.

> In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter, and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It is inconceivable that Congress by this provision intended to permit carriers to nullify, through the medium of collective bargaining agreements, conditions attached to prior orders of the Commission, and a brief examination of the section shows that it has no such effect. It directs the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected" when approving a merger, consolidation, lease, etc. This protection is to assure such employees that for a maximum period of four years they will not be in a worse position with respect to their employment than before. But such a provision in a Commission order, unless qualified, would be an invasion of the field normally covered by collective bargaining agreements between the carriers and the authorized representatives of their employees. The last sentence of the paragraph was therefore necessary to forestall the argument that, once the Commission had acted, there was no room for collective bargaining. The Commission has so applied the section. In prescribing conditions under this paragraph, it has left certain matters to be settled through collective bargaining negotiations. *Texas & P. Ry. Co. Operation*, 247 I. C. C. 285, 296–297.

But, in any event, the language of the last sentence of the paragraph makes it inapplicable to the instant case. The term "said employees" refers to those employees adversely affected in their employment status by action taken under a Commission order entered pursuant to Section 5 (2). Neither the employees of the River Road nor of the Central were affected, adversely or otherwise, by the imposition of Condition 3 of the Commission's order. In fact, in providing that *"the present traffic and operating relationships * * * shall be continued"* the direct effect of that condition was to preserve the status quo of those employees, as well as of the employees of the trunk line carriers connecting with the River Road.

Appellant apparently relies upon the case of *Gulf, M. & N. Co.* v. *Ill. Cent. R. Co.*, 21 F. Supp. 282 (D. C. Tenn., 1937) as in some way sustaining the validity of its alleged contract (Br. p. 31). That case was a suit by the G. M. & N. R. R. against the Illinois Central to restrain the latter from interfering with the former's operation of its freight trains over the Illinois Central tracks with its own engines and crews. This operation was conducted by the G. M. & N. under a trackage contract entered into pursuant to a certificate of convenience issued by the Commission. This contract provided for the operation of its trains by the G. M. &. N. with its own engines and crews, but the Commission's report accompanying its certificate did not discuss this feature and the certificate itself was silent on the matter. The occasion for the suit was a threatened strike by Illinois Central employees in protest against the operation of the G. M. & N. trains by G. M. &. N. crews.

It appeared at the trial that, *prior* to the issuance of the Commission's certificate, there had been an understanding and agreement between the Illinois Central and its employees that they would operate all trains over its tracks. While the suit was pending the Illinois Central offered to reimburse the G. M. & N. for the additional expense to it of having Illinois Central crews operate its trains.

The court refused to specifically enforce the trackage contract between the roads so far as use of G. M. & N. crews was concerned, stating in a *dictum* that if the Commission's order had authorized the operation to be conducted by G. M. & N. crews it would have exceeded the Commission's power for the reason that it has no jurisdiction over labor controversies.

There are a number of controlling distinctions between that decision and the case at bar. There the agreement giving the Illinois Central crews the right to the work preceded the Commission's order, whereas here the order preceded the alleged agreement by many years. There the order of the Commission was permissive, whereas here the conditions which came into force upon making the lease pursuant to the order were mandatory. There the order made no reference to the use of crews, whereas here all operating arrangements, including particularly the method of handling the cars here in question, were required to be continued in effect. There the agreement entered into pursuant to the Commission's certificate changed operating arrangements, whereas here the Commission's order specifically continued them in effect without change. There the question of the validity of the Commission's order was in issue, whereas here the validity of the order is *res judicata*.

It is therefore unnecessary to consider whether the decision was correct, as it has no application whatever to the instant case. However, it should perhaps be noted that the *dictum* with respect to the Commission's jurisdiction is obviously unsound, inasmuch as this Court specifically held in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 147, that "the jurisdiction of the Commission is exclusive" with respect to "the power to determine the terms and conditions under which trackage rights may be acquired."

For all of the foregoing reasons the alleged agreement between appellant and the River Road could not and did not create any rights in the River Road trainmen to perform the

work of operating plaintiffs' cars over the line of the River Road which the Commission's antecedent order required the River Road to permit the plaintiffs to continue to perform. Since appellant's motion to intervene is based entirely on its alleged contract with the River Road, it must fail.

B.

Had Appellant's Alleged Contract with the River Road Antedated the Order of the Commission, the Order Must Nevertheless Prevail.

As previously pointed out, the appellant has failed to allege by any pleading filed in the case the existence of any contract with the River Road which antedated the order of the Commission. Furthermore, although the court below, from the very beginning of appellant's attempt to participate in the suit and long before its motion to intervene was filed, and after said motion was filed, repeatedly made the point that appellant's alleged contract could not affect a previous order of the Commission (R. 76, 78, 79, 134, 135 and 136), the appellant never at any time claimed in that court that it had any contract with the River Road which antedated the Commission's order. Such claim was made for the first time in this Court. It is made here by implication on page 7 of appellant's brief wherein it is stated that the claim is based on the trainmen's alleged collective bargaining agreement signed December 20, 1919, "providing that they shall handle all 'yard work' on their employer's line (R. 108–109)" and on a "settlement interpretation" to that agreement dated January 23, 1946.

Assuming that the River Road became a party to the agreement on December 20, 1919, that agreement did not provide that its trainmen should handle all the "yard work" on its line. It simply defined "yard work" and provided that it should be done by yardmen (R. 108). The most that can possibly be implied from the agreement, to which a number of railroad

companies, including several of the plaintiffs herein, were and are parties, is that the yardmen of a particular railroad shall do all the yard work that such railroad may have to do.

It is alleged in the sworn complaint of the plaintiffs (R. 3) and stipulated as a fact (R. 51) by the plaintiffs, the Commission and the defendants (to which stipulation the appellant has made no objection) that on May 16, 1922, the date of the Commission's order, and for many years prior thereto, the plaintiffs had been doing with their own power and crews the work which appellant claims was the work of the River Road trainmen under the agreement of December 20, 1919. The order of the Commission directed that this practice should continue. Manifestly, if the River Road trainmen were given the right to do this work under the 1919 agreement they never asserted it and were not doing it when the order of May 16, 1922, was entered. When appellant first made claim to this work does not appear from any allegation in the pleadings filed by it, except that it is alleged in the motion to intervene (R. 91) and in the affidavit filed in support of the accompanying motion to dissolve the preliminary injunction, etc. (R. 104), that the trainmen "for some time protested" and then notified the River Road that if that claim and other disputes were not settled before 10:30 P. M. January 23, 1946, the trainmen would strike. In view of these facts it would seem reasonable to conclude that the agreement of 1919 had been in effect at least a quarter of a century before it occurred to the River Road trainmen to make the claim or protest which it later supported by the strike threat which in turn resulted in the so-called "settlement interpretation." These considerations demonstrate the exceedingly attenuated nature of the argument that the appellant's claim is based upon the agreement of 1919. It is so attenuated as to be frivolous.

But had the River Road been an original party to the 1919 agreement and had that agreement clearly conferred upon the River Road trainmen the right to do the work here claimed,

such agreement was clearly subordinate to the right of Congress to supersede it in the exercise of its regulatory power over interstate commerce.

Thus in *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, it was held that a contract made by a railroad for the issuance of annual passes to certain individuals in settlement of their claims for personal injuries against the railroad could not be specifically executed. The Court said (p. 482):

> "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist."

That the Commission in entering the order here in question was exercising such regulatory power of Congress over interstate commerce and that its jurisdiction in that regard is exclusive, is placed beyond doubt by the decision of this Court in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, discussed *supra* (p. 30), which also cites and follows the *Motley case* (p. 145). Thus if it should be assumed, in accordance with the implication of the statement in appellant's brief (which is wholly without support in the record) that the River Road became a party to the 1919 agreement prior to the date of the Commission's order, such fact could not avail it in this case because any such agreement was necessarily subordinate to the order of the Commission which plaintiffs are seeking to have enforced.

IV.

THE PETITION TO INTERVENE WITH THE ACCOMPANYING MOTION TO DISSOLVE THE INJUNCTION, ASSESS DAMAGES AGAINST THE PLAINTIFFS AND DISMISS THE SUIT, SHOWS THAT APPELLANT IS IN FACT ATTEMPTING A COLLATERAL ATTACK UPON THE ORDER OF THE COMMISSION, WHICH IS NOT PERMITTED.

Paragraph (c) of Rule 24 of the Rules of Civil Procedure, referring to a petition to intervene, states:

> "The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

As already pointed out (*supra*, p. 17), the only pleading accompanying appellant's motion to intervene was a motion to vacate the preliminary injunction, to assess damages against plaintiffs on account thereof and for summary judgment in favor of appellant. Unless the allegation that the complaint does not allege a violation of the order can be construed as an allegation that appellant's alleged contract is not in conflict with the order, then none of the numerous reasons assigned by appellant in support of its said motion is consistent with giving effect to the order, but each and all are reasons why the order should not be enforced. Fundamentally therefore the motion is an attack upon the order and an attempt to have the court nullify it through a refusal to enforce it.

Paragraph (12) of Section 16 of the Interstate Commerce Act (49 U. S. C. A. Sec. 16 (12)) pursuant to which this suit is brought provides:

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the en-

forcement of such order. If, after hearing, *such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise,* to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Thus the only issue before the court in a suit to enforce an order of the Commission is whether the order was regularly entered and duly served (mere formal matters) and whether it has been violated. If the court so finds, the statute is mandatory; "the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise."

In such a proceeding the defendant may not question the validity of or otherwise attack the Commission's order. It was so held in *Interstate Commerce Com'n.* v. *Consolidated Freightways*, 41 F. Supp. 651 (Dist. Ct., D. N. Dak., S. D., 1941). That was an action by the Commission to restrain alleged unlawful operations by the defendant. The defendant had petitioned the commission for authority to operate as a common carrier by motor vehicle between certain points, pursuant to the so-called grandfather provisions of the Interstate Commerce Act pertaining to motor carriers. And the Commission had by order denied the petition. As a defense to the suit to enforce the order the defendant alleged various errors of the Commission in making it. The court held that these constituted an indirect attack upon the order and could not be availed of in such a suit. It said (p. 655):

"If the Commission errs in its application of the law to evidence received before it, legal machinery is provided for a test thereof in a direct proceeding. See 49 U.S.C.A. §17 (9); 28 U.S.C.A. §47.

"The contentions made by the defendant here amount to an indirect attack upon an order of the Commission,

which the defendant in this proceeding seeks to invalidate. Suits seeking to set aside orders of the Commission may only be tried under the Urgent Deficiencies Act, 28 U. S. C. A., Sec. 47. See *Powell et al.* v. *United States et al.*, 300 U. S. 276, 288, 57 S. Ct. 470, 81 L. Ed. 643.

> "There is no foundation or basis in the law for collateral attack upon an order of the Commission. Compare: *Board of Public Utility Commissioners of New Jersey* v. *United States et al.*, D. C. 21 F. Supp. 543, 547; *Powell et al.* v. *United States et al.*, *supra*, 300 U.S. page 288, 57 S. Ct. 470, 81 L. Ed. 643; *Venner* v. *Michigan Central Railroad Company*, 271 U.S. 127, 46 S. Ct. 444, 70 L. Ed. 868."

Thus the defendant was not permitted to defeat the enforcement of the order by reason of matters which constituted an attack on its validity. So in the instant case appellant should not be permitted to intervene for the purpose of attacking the validity of the order and so defeat its enforcement. The mere fact that appellant does not directly ask that the order be declared invalid does not establish that the purpose of the intervention is not an attack upon it.* Any position taken by appellant which would deny to the order its full and legitimate effect and the right to its enforcement is essentially an attack upon the order itself. Thus in *Venner* v. *Mich. Cent. R. R. Co*, 271 U.S. 127, this Court said (p. 130):

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, *which is equivalent to asking that the order be adjudged invalid and set aside.*"

Furthermore, as above pointed out (p. 27 *supra*), the order has by a final decree of a court of competent jurisdiction been

*Appellant does allege that the Commission did not have jurisdiction to issue the order (R.101).

held valid and binding upon the River Road and anyone claiming by, through or under it.

V.

IF APPELLANT CONSIDERS THAT THE TRAINMEN WHOM IT PURPORTS TO REPRESENT ARE AGGRIEVED BY THE ORDER OF THE COMMISSION, IT HAS MISTAKEN ITS REMEDY IN SEEKING TO INTERVENE IN THIS SUIT. IT SHOULD EITHER BRING AN ACTION UNDER 28 U.S.C.A. SECTION 47 TO SET ASIDE THE ORDER, OR APPLY TO THE COMMISSION FOR ITS MODIFICATION OR RESCISSION.

If appellant considers that the trainmen, whom it purports to represent, have any rights, not stemming from its contract with the River Road, which are invaded by the order, it may bring a suit under 28 U.S.C.A. Section 47 to set the order aside, to which suit the United States is an indispensable party. 28 U.S.C.A., Sec. 46, and cases cited next below. Congress has expressly provided that means by which aggrieved parties may attack Commission orders and no others are permitted. *Powell v. United States*, 300 U.S. 276, 288; *Lambert Co. v. Balt. & Ohio R. R. Co.*, 258 U.S. 377, 382; *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U.S. 485, 489; *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U.S. 493, 504.

Furthermore, the order itself leaves the door open for appellant, on behalf of the trainmen, to apply to the Commission for modification of any of the conditions of the order, provided it appears that the trainmen have an interest and that the public interest requires the modification sought. Condition 17 of the order provides (R. 34-35):

> "Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose."

Thus if appellant, as a representative of the trainmen, has any legitimate ground for complaint against the order, it has available to it both a judicial and an administrative remedy. It may sue in court under 28 U.S.C.A. Section 47 to set aside the order or it may apply to the Commission to reopen the proceeding in which the order was made and modify it. Appellant should be remitted to a choice of those remedies and should not be allowed to enter this proceeding for the purpose of attacking the order collaterally.

VI.

NEITHER THE ALLEGATIONS OF THE PETITION TO INTERVENE NOR OF THE MOTION TO VACATE THE PRELIMINARY INJUNCTION, ETC., SHOW THAT RIVER ROAD TRAINMEN WILL SUSTAIN ANY LOSS AS A RESULT OF THE ENFORCEMENT OF THE OPERATING RIGHTS OF PLAINTIFFS OVER THE RAILROAD OF THE RIVER ROAD.

In addition to the fact that a contract in conflict with the order of the Commission can create no rights in the River Road trainmen, it should be noted that neither the petition to intervene nor the motion to vacate the preliminary injunction, etc., which appellant sought to file, states facts which show that any of the trainmen of the River Road on whose behalf the contract with that company is alleged to have been made would sustain any loss through enforcement of the order. The allegations of the petition to intervene are that, under appellant's contract with the River Road, the latter agreed that its trainmen should be permitted to do the work theretofore performed by plaintiffs' employees. In addition, the affidavit in support of the motion to vacate the preliminary injunction etc., referring to the employees of the River Road, including not only trainmen represented by appellant, but also engineers, firemen and enginemen, not represented by appellant, and who are not seeking to intervene, states (R. 105):

> "Such employees are losing work to which they are entitled and wages therefor believed to be in excess of $200 per day."

It is submitted that these allegations are entirely insufficient to show that the employees represented by appellant will sustain any loss through enforcement of plaintiffs' right to operate over the River Road. Their claim is one for special damages and it is well settled that the allegations in support of such a claim must be sufficient to show that damage necessarily resulted. *The Director*, 26 Fed. 708, 713; *Dissette* v. *Dost*, 280 Fed. 455, 456; *Gray* v. *Schoonmaker*, 30 F. Supp. 1019, 1023. The rule is not satisfied here. The allegation is made that the employees represented by appellant are being deprived of particular work that they are entitled to do, but it is not alleged that they are not now working full time and therefore could do the work in question if permitted to. This is a fatal defect in appellant's allegation of damage.

The affidavit in support of the proposed motion to vacate the preliminary injunction also alleges that the River Road employees (R. 105–106):

> " * * * are now filing time claims against said carrier arising out of such violation (of the alleged contract between appellant and the River Road) but have been paid nothing on account thereof, and, unless such claims are paid, further dissatisfaction will result among said employees."

It is not clear whether this is intended to be an allegation of damages suffered as a result of the injunction. It is entirely different from the theory of damage through deprivation of work above discussed. Whether it states a valid claim or not, it does not state one *against plaintiffs*. If the claims referred to are valid, the employees of the River Road may proceed *against that company*. But those claims will not be passed upon in this suit and the fact that they exist does not show the River Road employees will suffer a loss from enforcement of the Com-

mission's order in this suit. On the contrary, the affidavit indicates that if those employees have a valid contract with the River Road they have an adequate remedy against the River Road which can in no way be affected by any decree in this suit.

VII.

ASSUMING, ARGUENDO, THAT APPELLANT HAS A VALID CONTRACT WITH THE RIVER ROAD, SUCH FACT WOULD NOT ENTITLE IT TO INTERVENE.

If, for the purpose of argument, it be assumed appellant has alleged facts from which it can be said it has a valid contract with the River Road, the existence of such a contract would not entitle it to intervene.

The River Road trainmen have no direct interest in or claim to the obligation of the defendant companies embodied in the order of the Commission which this suit seeks to enforce. Even though the incidental effect of the decree might be to deprive them of the work which it is alleged the River Road has agreed they may do, nevertheless the decree would not deprive them of any rights which they might have against the River Road for breach of their alleged contract. Neither the meaning nor the validity of that contract is in issue.

The trainmen's interest in having the defendant companies free to perform their alleged contract with them is not such an interest as to permit them to intervene as a matter of right. This is established by the case of *United States* v. *California Canneries*, 279 U.S. 553. In that case, the Government filed a complaint against the Big Five meat packers, including Armour & Co., alleging violations of the anti-trust laws. On the same day the defendants filed their respective answers denying violations, and there were also filed stipulations for a consent decree which was entered in accordance with the stipulations. The decree enjoined the defendants from dealing in produce unrelated to the meat packing industry, including all kinds of fresh,

dried, canned and processed fruits and vegetables. By the decree the court retained jurisdiction of the cause for the awarding of further relief, enforcing the decree or entertaining applications with respect thereto. Subsequently the California Cooperative Canneries filed a petition for leave to intervene upon the ground that the decree prevented Armour & Co. from carrying out a contract with it for the purchase of large quantities of fruit which would result in very heavy losses to the petitioner. The contract contained a provision to the effect that in the event governmental action should materially interfere with its performance by Armour & Co., that company should have the right to terminate the contract without any liability to the California Canneries for any loss resulting therefrom. (See *California Co-Op. Canneries* v. *United States*, 299 Fed. 908, 910.)

The petition alleged that the decree was entered without any notice to the petitioner, or opportunity to be heard in opposition thereto, that as soon as petitioner had any knowledge thereof "it actively endeavored, in various ways and before various tribunals and officers, to secure a vacation or modification of the decree" in so far as it affected petitioner's rights (299 Fed. 911). The Supreme Court of the District of Columbia denied the petition, and petitioner appealed to the Court of Appeals of the District. That court reversed the decree of the court below and directed that petitioner be permitted to intervene. This action of the Court of Appeals was reviewed by this Court on certiorari and the judgment reversed. *United States* v. *California Canneries*, 279 U.S. 553. In reversing, this Court said (p. 556):

> "On April 29, 1922, the Canneries made a motion for leave to file an intervening petition. The petition accompanying the motion alleged that the consent decree interferes with the performance by Armour & Co. of a contract theretofore made with it, by which Armour agreed to buy large quantities of California canned fruit. The petition charged that the decree is void because the Supreme Court

of the District lacked jurisdiction; and it prayed that the decree be vacated. The Supreme Court denied leave to intervene. The Canneries appealed to the Court of Appeals. That court, so far as appears, did not consider the question whether, in view of the Expediting Act, it had jurisdiction on appeal. It *did not refer to the decisions which hold that an order denying leave to intervene is not appealable, In re Cutting*, 94 U.S. 15; *Credits Commutation Co.* v. *United States*, 177 U.S. 311; *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581; *In re Engelhard*, 231 U.S. 646; *City of New York* v. *Consolidated Gas Co.*, 253 U.S. 219; *New York* v. *New York Telephone Co.*, 261 U.S. 312, *except where he who seeks to intervene has a direct and immediate interest in a res which is the subject of the suit*, compare *French* v. *Gapen*, 105 U.S. 509, 524–526; *Smith* v. *Gale*, 144 U.S. 509; *Leary* v. *United States*, 224 U.S. 567; *Swift* v. *Black Panther Oil & Gas Co.*, 244 Fed. 20, 30."

It will be observed that the California Canneries had a very valuable contract to sell fruit to Armour & Co. which the decree rendered it impossible for Armour & Co. to perform. Not only was this so but the contract was so drawn as to absolve Armour & Co. from any liability for non-performance under the circumstances.

The interest of the trainmen, if any, in the present litigation is less direct and will be less affected than was the interest of the California Canneries which this Court held was not sufficient to entitle it to intervene as a matter of right. As above pointed out, while a decree for the plaintiffs in the instant case would prevent the River Road from performing its alleged contract with appellant, it would not operate to deprive the trainmen of a claim for any damages which they may be able to show as a result of a breach thereof if the contract is valid.

The case of *Babcock* v. *Town of Erlanger*, 34 F. Supp. 293 (Dist. Co., E.D. Ky.), is also rather closely analogous to the instant case. That was a suit by the buyer of water bonds against the town of Erlanger to cancel a contract for the purchase of the bonds and for recovery of moneys advanced by the

buyer upon the ground that the contract was procured through fraud and misrepresentation. The contractors employed by the city to build the water works system, who had partly performed their contract and who were to be paid from the proceeds of the bonds, sought to intervene. The court denied intervention, after quoting Rule 24 (a) and pointing out that cases of intervention decided prior to the adoption of the rule were in point. The court said (p. 295):

> "I am of the opinion that the proposed pleadings accompanying the motions to intervene do not meet the requirement. There is no privity of contract between the interveners and the complainants. *National Savings Bank* v. *Ward*, 100 U.S. 195, 25 L. Ed. 621. To so hold would be to bind complainants to the interveners with no obligation on the part of the interveners to the complainants. The right to intervene should not be a matter of speculation. The pleading accompanying the motion to intervene should set up the interest of the party just as in an original bill. *Rhinehart* v. *Victor Talking Machine Company*, D.C., 261 F. 646.
>
> "The position of the interveners is untenable. There is no *res* in court in which they have an interest. There is no right which they have which would be denied them by a judgment of this court whether in favor of the complainant or defendant. The fund sought to be recovered by the complainant is certainly not a fund in court over which there is litigation within the meaning or contemplation of the rule. This is a direct and simple proceeding to cancel a contract on the ground of fraud. The court is called upon to say 'yes' or 'no' to the prayer of the plaintiff's bill. If the court says 'yes' there was fraud, the money paid to the defendant must be returned. Certainly interveners cannot seriously contend that they would still have a claim upon this sum of money. *If the court says 'no' there was no fraud, then the contract is still in force and the interveners may proceed to enforce their rights against the defendant to collect for materials furnished or work done in accordance with this agreement with the defendant.*"

The court concluded as follows (p. 296):

> "There is no privity of contract. No element of trusteeship, no fund in court to which they could possibly lay claim, and no statutory enactment conferring upon them the right to intervene.
>
> "This is simply an action to cancel a contract, as I have heretofore said. Complainant is entitled to present the clear cut question of fraud in the procurement of a contract and the court should not permit the introduction of litigation having no relation to that opened by the original complaint. *Chandler & Price Co.* v. *Brandtjen & Kluge*, 296 U.S. 53, 59, 56 S. Ct. 6, 80 L. Ed. 39."

As stated by the court, the only question before it on the original complaint was whether the contract for the sale of the bonds should be canceled on account of fraud in its procurement. So in the instant case, the only question before the court on the complaint and the intervening complaint is whether the order of the Commission has been violated by the defendants. If such is the case, as above pointed out, paragraph (12) of Section 16 of the Interstate Commerce Act is mandatory to the effect that the order shall be enforced by an injunction. If it should be argued that appellant has a right to be heard on the question of whether the order of the Commission is violated, it could be argued with equal force that the contractors in the *Erlanger case* had a right to be heard on the question of whether there was fraud in the procurement of the contract to purchase the bonds. But that argument was rejected in the *Erlanger case* and by the same token it should be rejected here. There is no privity of contract between the plaintiffs and those whom the appellant claims to represent, just as there was no privity of contract between the buyers of the bonds and the contractors seeking to intervene in the *Erlanger case*.

As was well said by this Court in *Willard* v. *Tayloe*, 75 U. S. 557 (p. 571):

> "The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary

parties to bills for their enforcement. *The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern.*

See also *Cella* v. *Brown*, 144 Fed. 742 (C. C. A. 8), to the same effect.

The case of *International Brotherhood* v. *Keystone Freight Lines*, 123 F. (2d) 326, relied on by appellant (Br. p. 21), has no application to this suit. In that case the plaintiff, a motor carrier, was engaged in a labor dispute with its own employees who were on strike. Connecting motor carriers who customarily interchanged freight with plaintiff were refusing to do so for the reason that their employees, who were members of the union that had called the strike against plaintiff, refused to handle such freight. Plaintiff sued to compel the connecting motor carriers, the union and its members who were employees of the latter, to interchange freight with it. The union was denied leave to intervene by the court below. On appeal it was held that the case was moot, but the Court of Appeals said in a *dictum* that the intervention should have been allowed below.

In that case the court's opinion that the union was the real party in interest is readily understandable. Primarily plaintiff's controversy was with its striking employees, represented by the union, and the purpose of plaintiff's suit was to defeat the strike by compelling the employees of the connecting carriers, also members of the union, to interchange freight with the plaintiff. Here there is no controversy between plaintiffs and their employees or the employees of the River Road. The only issue is whether the River Road itself shall continue to obey the order of the Commission, as it has been doing for 26 years, or shall now for the first time violate it. So far as plaintiffs and the Commission are concerned, appellant is an utter stranger to that controversy. Neither plaintiffs nor the Commission have any control over or are in any way concerned with the relations, contractual or otherwise, existing between the em-

ployees represented by appellant and the River Road. So far as plaintiffs and the Commission are concerned the real parties defendant are the carriers who have violated the order of the Commission, which both the plaintiffs and the Commission are entitled to have enforced. No rights of the employees represented by the appellant will be adjudicated.

The most that a decree in this suit could do would be to prevent the River Road from specifically performing its alleged contract with appellant. But appellant has cited no authority for the proposition that, if A sues to enforce an obligation of B to A, parties holding subsequent contracts with B, the performance of which by B might be impaired by a judgment in favor of A, have any right to intervene in such an action. If such a principle were admitted, the utmost confusion would result from the intervention of parties whose alleged interest might lie in having B found free from the asserted obligation.

Appellant's insistence that the trainmen it represents are the real parties defendant in interest in this suit borders on the frivolous. What is involved in this suit is the operating rights of plaintiffs over the line of the River Road, a switching line occupying a strategic position in the industrial heart of Chicago. Those rights are valuable to plaintiffs, as is evidenced by the fact that, if the order of the Commission is not enforced, the plaintiffs will have to pay $12.96 for each loaded car handled by the River Road for them for which they have been heretofore paying $1.00 per car, loaded or empty, for the right to handle over the River Road's lines with their own engines and crews. By like token those rights involve a burden upon the defendant carriers who, so long as those rights are exercised, cannot make what is obviously a highly profitable charge against the plaintiffs for handling plaintiffs' cars. Not only is this so, but failure to enforce the order would deprive the plaintiffs of direct access to the Chicago Union Stock Yards and thus prevent them from maintaining there (a point of origin of

much traffic) direct contact with shippers and render them powerless to see that adequate service is given such shippers, thus placing them at an obvious disadvantage with the Central, a competing trunk line, by which the River Road is wholly owned.

The competitive disadvantages which the order of the Commission here involved inflicted upon plaintiffs to the benefit of the Central is rather fully discussed by this Court in the *Chicago Junction Case*, 264 U. S. 258, 266–267. Condition 3 of the order was designed to alleviate the harm which would otherwise have been done plaintiffs by the order, which this Court in that case (p. 627) characterized as "injury inflicted by denying the plaintiffs equality of treatment."

The matter of who shall do the work of the trainmen involved in the movement of the cars in question is a very minor one, except as it involves in its consequences a change in the very important traffic and operating relations which have existed since before 1922 between the plaintiffs on the one hand and the defendants on the other. Appellant would have the diminutive tail of its trainmen's claim wag the whole dog. Its insistence that it is the real party defendant in interest has no more substance than would the insistence of a contractor who held an exclusive right to supply the River Road with coal that he was the real party in interest because the River Road would need less coal if it did not handle the cars in question. No one would seriously contend that such a contractor had an absolute right to intervene in this suit. Appellant has no greater right.

We believe that the foregoing authorities and considerations demonstrate that appellant has not shown such an interest in this suit as would entitle it to intervene as of right, even if such interest were not being adequately represented.

VIII.

THE MERE FACT THAT INJUNCTIVE RELIEF WAS ASKED AND GRANTED AGAINST THE EMPLOYEES OF THE RIVER ROAD DOES NOT ESTABLISH THAT THEY HAVE AN INTEREST IN THE SUIT.

Appellant asserts (Br. p. 21):

> "* * * The fact that direct injunctive relief is sought against the River Road employees is of itself sufficient proof that the interest of the Brotherhood, as their representative, is such that the Brotherhood is an indispensable party."

Of course this statement is utterly without foundation. Appellant is here confusing the subject of indispensable parties with the subject of intervention, which, as previously shown, are totally different subjects. It is elementary law, fully recognized by Rule 65 (d) of the Rules of Civil Procedure, that an injunction may issue against and be binding on the agents and employees of a party without their being made parties to the suit, because to hold otherwise would enable a defendant to nullify the decree by carrying out the prohibited acts through its agents, servants or employees, or those identified with it. *Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436, 440; *In re Lennon*, 166 U. S. 548, 554.

Thus in *Dadirrian* v. *Gullian*, 79 Fed. 784 (Circuit Ct. N. J.), the court said (p. 786):

> "* * * The writ is directed specifically to the defendants in the suit, and then generally, without naming them, to their servants, agents, and employes. The object of this generalization is to prevent the defendants from doing by others that which the court has forbidden them to do personally; from accomplishing indirectly a result prohibited by the court. The full effect of the order is that the defendant shall not do the unlawful act himself, neither shall his agent, servant, or employé do it for him, nor shall

the defendant do it as the agent, servant, or employe of another. Potter v. Muller, 1 Bond, 601, Fed. Cas. No. 11,333. There is no restraint laid upon the agent, servant, or employe personally, but merely as the agent, servant, or employe of the enjoined defendant. Slater v. Merritt, 75 N. Y. 268; Wellesley v. Mornington, 11 Beav. 181. Notwithstanding the injunction and notice of it, he upon ceasing to be the agent, servant, or employe of the defendant, is free to act for himself in the protection of his own rights and the prosecution of his own interests, even though it involve his doing the very thing prohibited his former master. Mexican Ore Co. v. Mexican Guadalupe Mining Co., 47 Fed. 356. He may avoid obedience to a mandatory injunction by actually ceasing to be an employe of the company (Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 743); and he may enter the service of another master a stranger to the suit, and be as free as he from obligation to obey the court's decree (People v. Randall, 73 N. Y. 416; Slater v. Merritt, 75 N. Y. 268)."

Thus there can be no doubt that the agents and employees of the River Road, including the trainmen represented by appellant, in their capacity of such agents and employees, are and so long as they remain in such capacity will be bound by the preliminary injunction issued in this case and will also be so bound by any like permanent injunction which may be issued, and it is wholly unnecessary to make them or their representatives parties to the suit in order to so bind them.

Whether appellant is entitled to intervene as of right depends solely upon whether it has alleged in its pleadings facts sufficient to establish such right under Rule 24 (a) (1) and (2) of the Rules of Civil Procedure. Whether the facts alleged are sufficient for that purpose depends upon the extent of the interest, if any, which appellant has shown it has in the issue raised by this suit, and the purposes for which intervention is sought. The mere fact that the injunction runs against the employees of the River Road as its agents in no manner tends to establish that they have an interest in the suit. The injunction runs

against them solely for the purpose of preventing the River Road from doing through them as its agents the things the River Road itself is enjoined from doing.

IX.

IF APPELLANT HAS ANY INTEREST IN THIS SUIT, WHICH PLAINTIFFS DENY, IT IS BEING ADEQUATELY REPRESENTED BY THE DEFENDANTS.

Appellant contends (Br. pp. 27–35) that it is entitled to intervene as a matter of right because its interests are not being adequately represented by the defendants, particularly the River Road. Since, as above demonstrated, the trainmen do not have any interest in the controversy which entitles them to intervene as a matter of right, the contention that such interests are not being adequately represented necessarily comes to naught. However, we will consider the alleged failure of the defendants to call the attention of the Court to the Norris-LaGuardia Act and certain decisions in connection therewith, and to Section 5 (2) (f) of the Interstate Commerce Act, together with certain of appellant's suggestions relative to the defense of the case on its merits, as bearing on the alleged inadequacy of the defendants' defense to the suit.

A.

The contention that the Norris-LaGuardia Act prohibits the court from enforcing the order of the Commission is frivolous.

The Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue any injunction "in a case involving or growing out of a labor dispute" except in conformity with the Act, and that no injunction shall "be issued contrary to the public policy declared" in the Act. 29 U.S.C.A. Section 101.

(1) THIS SUIT DOES NOT INVOLVE AND DID NOT GROW OUT OF A LABOR DISPUTE.

This suit grows out of the refusal of the defendants to obey the order of the Commission requiring them to continue the right of the plaintiffs to operate their cars to and from the Union Stock Yards over the line of the defendant River Road. Under the specific provisions of paragraph (12) of Section 16 of the Interstate Commerce Act the failure of the defendants to obey that order gave rise to the cause of action which plaintiffs have stated in their complaint in this suit. Furthermore, upon proof of the breach of that order, the court is commanded to issue an injunction enforcing it. The duty to obey the order is absolute unless and until it is set aside by a court of competent jurisdiction or is vacated or modified by the Commission itself. Neither the plaintiffs nor the court are in any way concerned with the considerations which might have influenced the defendants to commit a breach of the order. Such factors have no bearing on the plaintiffs' right to maintain this suit and are not pertinent to any issue presented by it. The suit therefore does not involve and did not grow out of a labor dispute. It involves and grows out of a violation of the Commission's order.

(2) A FUNDAMENTAL RULE OF STATUTORY CONSTRUCTION FORBIDS THE APPLICATION OF THE NORRIS-LaGUARDIA ACT TO THIS SUIT.

The Norris-LaGuardia Act (29 U.S.C.A. Secs. 101–115) was enacted March 23, 1932. It is broad in its scope and deals with situations having an almost infinite variety of aspects and arising anywhere in the field of labor relations.

Paragraph (12) of Section 16 of the Interstate Commerce Act, under which plaintiffs brought this suit, has been twice amended and as so amended reenacted since the passage of the Norris-LaGuardia Act. It was amended on April 9, 1935 (c. 498, Sec. 1, 49 Stat. 543) and again on September 18, 1940 (c. 722, Title I, Sec. 11(a), (b) 54 Stat. 912, 913). As so last amended and reenacted it provides (49 U.S.C.A. Sec. 16 (12)):

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while

> the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

This section deals with a very limited field and is definite and specific in its requirements. An order of the Commission duly made and valid, as the order in this case has been decreed to be, has the force and effect of law. Paragraph (12) is definite, specific and mandatory in its direction as to how such order shall be enforced.

It is a fundamental rule of statutory construction that statutes dealing with special and restricted subject matters are not affected by statutes of broad and general application unless they are specifically mentioned therein.

In *Virginian Ry. Co.* v. *Federation*, 300 U.S. 515, the court had issued an injunction which, among other things, commanded the railway company to treat with the representatives of its employees, a duty imposed upon it by Sec. 2, Ninth, of the Railway Labor Act (45 U.S.C.A. Sec. 152, Ninth). To the objection that the Norris-LaGuardia Act had not been complied with, this Court, speaking through Mr. Justice Stone, said (p. 563):

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of §2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. *Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-*

LaGuardia Act. See the *Railway Clerks* case, *supra*, 571; (281 U.S. 548) cf. *Callahan* v. *United States*, 285 U.S. 515, 518; *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 22; *International Alliance* v. *Rex Theatre Corp.*, 73 F. (2d) 92, 93."

In fact the rule that a general statute will not affect a special statute also applies in the case where the special statute is prior in time to the general statute. Thus in 59 Corpus Juris, Statutes, it is said (p. 1057):

> "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, *unless it is repealed in express words or by necessary implication.*"

The same rule is stated in 50 American Jurisprudence, Statutes, p. 564.

In *Rodgers* v. *United States*, 185 U.S. 83, this Court said (p. 87):

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

After quoting from decisions in a number of other cases, this Court continued (p. 88):

> "In Black on Interpretation of Laws, 116, the proposition is thus stated:
>
> "'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'
>
> "So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:
>
> "'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, *unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.*'"

The above case has been often cited and followed by this Court. See, *e.g.*: *Washington* v. *Miller*, 235 U.S. 422, 428; *United States* v. *Berkeness*, 275 U.S. 149, 155–156.

Certainly it is not absolutely necessary, in order to give the provisions of the Norris-LaGuardia Act any effect, to so construe it as to prevent a court of the United States from enforcing by injunction an order of the Interstate Commerce Commission which it is specifically commanded to do by the provisions of said paragraph (12). Yet, according to this Court, unless there is such necessity, paragraph (12) must stand as an exception to the Norris-LaGuardia Act.

(3) THE NORRIS-LaGUARDIA ACT IS NOT APPLICABLE TO THE UNITED STATES WHICH, ACTING THROUGH THE INTERSTATE COMMERCE COMMISSION, IS ASKING FOR THE ENFORCEMENT OF THE COMMISSION'S ORDER.

In *United States* v. *United Mine Workers of America*, ... U.S. ...., 67 S. Ct. 677, this Court held that the Norris-LaGuardia Act was not applicable to the United States, saying (p. 686):

> "There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect."

As previously pointed out, the Interstate Commerce Commission filed an intervening complaint in this suit on February 21, 1946, within nine days after the complaint of the plaintiffs was filed, in which it charged that the defendants were violating its order of May 16, 1922, and Condition 3 thereof, and in which it prayed for a preliminary and a permanent injunction "restraining and enjoining the defendants and each of them, their respective officers, agents, representatives, servants, employees and successors from (a) failing and neglecting to obey said order of the Commission of May. 16, 1922," and from "(b) violating condition 3 of said order of the Commission of May 16, 1922." (R. 47–49.)

As previously pointed out, paragraph (12) of Section 16 of the Interstate Commerce Act specifically gives the Commission authority to apply to the appropriate District Court of the United States for the enforcement of its orders. In its complaint the Commission alleged that Section 5 (8) of the Interstate Commerce Act (49 U. S. C. A. Sec. 5 (8)) gives the court jurisdiction to award the relief prayed for by it (R. 49).

Section 5 (8) provides:

> "The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a

violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

Section 5 (8) was first enacted as Section 5 (13) by the Act of June 16, 1933 (more than one year after the enactment of the Norris-LaGuardia Act) (c. 91, Title II, Sec. 202, 48 Stat. 217-220), and was amended and renumbered as Section 5 (8) by the act of September 18, 1940 (c. 722, Title I, Sec. 7, 54 Stat. 905).

That the Commission is an arm of the United States Government to which Congress has, by the Interstate Commerce Act, delegated certain of its sovereign powers, cannot be doubted. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 426, 427; *Inter-Mountain Rate Case*, 234 U.S. 476, 486.

Nor can it be doubted that in entering the order of May 16, 1922, and in seeking its enforcement, it is exercising such delegated powers of sovereignty. *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12; *Texas* v. *U. S.*, 292 U. S. 522; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134.

There is obviously no legitimate reason why the Norris-LaGuardia Act should be a bar to a suit brought by the Interstate Commerce Commission to enforce its order if, as is this case, it would be no bar had the suit been brought by the Attorney General in the name of the United States. Either the Commission or the Attorney General is authorized to bring such suit under paragraph (12) of Section 16 of the Interstate Commerce Act.

Furthermore, the rules of statutory construction above discussed are peculiarly applicable to a suit brought by the Commission under Section 5 (8), first enacted after the passage of the Norris-LaGuardia Act, and being limited in its scope to the enforcement of orders issued under Section 5 of the Interstate

Commerce Act, under which section the order here involved was entered.

Therefore, for three reasons, each of which in and of itself is sufficient in the premises, the Norris-LaGuardia Act is not applicable to the present suit. These reasons are, (1) the suit does not arise or grow out of a labor dispute; (2) even if it did, a fundamental rule of statutory construction forbids the application of the Act to this suit; (3) the Norris-LaGuardia Act is not applicable to the United States which, acting through the Commission, is asking for the enforcement of the order.

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(4) THE CASES CITED BY APPELLANT DEALING WITH THE NORRIS-LaGUARDIA ACT HAVE NO APPLICATION.

In view of the foregoing considerations, only brief notice need be given to the cases cited by appellant (Br. pp. 29–31) in support of its position that the Norris-LaGuardia Act is applicable to this suit.

The case of *Trainmen* v. *Tol., P. and W. R. Co.*, 321 U.S. 50, simply holds that the Norris-LaGuardia Act prevents a railroad from procuring an injunction restraining violence on the part of its striking employees where it has not fully complied with the requirements of the Railway Labor Act (45 U.S.C.A. Secs. 151–164). That case is in no way applicable here.

Southeastern Motor Lines v. *Hoover Truck Co.*, 34 F. Supp. 390 (Dist. Ct., M.D. Tenn.), and *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. (2d) 931 (C. C. A. 10), are likewise inapplicable. In both cases the plaintiffs, who were motor carriers, were engaged in labor disputes with their own employees and their places of business were being picketed. Connecting motor carriers who customarily interchanged freight with plaintiffs had contracts with their employees which provided that they would not be required to cross picket lines. In

each case the plaintiff sued to compel the connecting motor carriers to continue to interchange freight with it. Mandatory injunctions were refused because a labor dispute was involved within the meaning of the Norris-LaGuardia Act. In both cases there were labor disputes between the plaintiffs and their own employees which had resulted in strikes, and the employers were seeking the aid of the general equity powers of the court to break the strikes. This is precisely what the Norris-LaGuardia Act prohibits. None of the three above mentioned considerations making the Norris-LaGuardia Act inapplicable to this suit obtained in either of those cases.

B.

Section 5 (2) (f) of the Interstate Commerce Act Has no Application to this Suit.

We have previously shown (pp. 31-33) that Section 5 (2) (f) of the Interstate Commerce Act and the case of *Gulf, M. & N. R. Co.* v. *Illinois Cent. R. Co.*, 21 F. Supp. 282, have no bearing on the issues raised in this suit and hence the alleged failure of the defendants to call the Court's attention thereto (Br. p. 35) has no tendency to show that the defendants' defense to the suit is or will be inadequate.

C.

Appellant's Suggestions as to the Matters Involved in a Defense to the Suit on its Merits are Frivolous and Were Not Made in the Court Below. Defendants' Answer Has Raised All Possible Defenses to the Suit on its Merits.

It is finally suggested by appellant (Br. 35-36) that a careful inquiry should be made into the exact provisions of the Commission's order, the report on which it is based, and the actual traffic and operating relations which existed between the River Road and the other carriers at the time of the entry of the

order; that most important of all, such an inquiry would show what employer-employee relationships then existed between the various carriers involved and their employees, and particularly between the River Road and its employees; and that without a complete investigation of such subjects it cannot be determined whether there is any conflict between the Commission's order and appellant's contract. It is further stated that no answer was filed by the River Road denying plaintiffs' charges that the order of the Commission was being violated until more than two months after the preliminary injunction was issued.

It should be noted that these suggestions regarding the matters which should be investigated in the suit have been made for the first time in this Court. No question concerning any of them was raised in the petition to intervene or in the accompanying motion to dissolve the preliminary injunction, etc. Furthermore, the suggestions are frivolous.

There is no possible doubt of the existence of the practice which plaintiffs and the Commission are seeking to compel the defendants to continue. It is admitted by appellant's motion to intervene (R. 90–91), alleged in appellant's affidavit tendered in support of its motion to dissolve the preliminary injunction, etc. (R. 104), alleged in the sworn complaints of the plaintiffs (R. 3) and of the Commission (R. 48), stipulated as a fact by the plaintiffs, the Commission and the defendants (R. 51–52), and found as a fact by the court below (R. 59–60). Furthermore, the only objection taken by appellant to the stipulation of facts in its motion to intervene is that it did not adequately call to the attention of the court "that this suit involves and grew out of a labor dispute and that any action taken by the court must be in compliance with the laws relating to injunctions in labor disputes." As to the suggestion that the relations existing between the various carriers and their employees, and particularly the River Road and its employees, should be in-

vestigated, it should be noted that presumably the appellant is peculiarly qualified and informed regarding the relations existing between the River Road and its trainmen, yet the most that appellant could, or at least did, allege in regard thereto in its petition to intervene is that appellant, as the representative of the River Road trainmen, had negotiated an agreement with the River Road "which is now and has been in effect for several years last past" (R. 90), which allegation is repeated in the affidavit in support of the motion to dissolve the preliminary injunction, etc. (R. 103), which affidavit also shows, as fully pointed out, *supra*, p. 14, that the alleged agreement was not made until 1937 or after.

Furthermore, the order of the Commission did not purport to change any employer-employee relationships existing between the River Road and its employees but the effect of the order was to maintain the status quo in respect thereto.

While it is true the answer of the River Road was not filed until more than two months after the preliminary injunction was issued, when it was filed it categorically denied that the Commission's order and Condition 3 thereof had been violated by the River Road (R. 84). This is more than appellant did in its petition to intervene or in the accompanying motion to dissolve the preliminary injunction, etc. As one of the numerous grounds alleged in support of its motion for a summary judgment in its favor, appellant alleged that the complaint did not contain allegations of any violation of the Commission's order (R. 101). This oblique denial, if it is a denial, that the order of the Commission was being violated, is the only suggestion of an attempt on the part of appellant to interpose a defense to the suit on its merits, although its petition to intervene and the accompanying motion were presented to the court two weeks after the answer of the defendants had been filed, which fully raised any theoretically possible defenses to the case on its merits.

No one can read appellant's petition to intervene and the accompanying motion to dissolve the preliminary injunction, assess damages against the plaintiffs and for a summary judgment in favor of appellant, and escape the conviction that the appellant was not interested in intervening for the purpose of defending the suit on its merits. Appellant made its motion to intervene in the hope of securing a judgment by the court which would enable the River Road trainmen to disregard with impunity any action which might be taken by the court to secure the observance of the order of the Commission. If the preliminary injunction were dissolved and a summary judgment entered for it, appellant would no longer be concerned with the adjudication of the case on its merits or with what might be the decision of the court regarding the obligation of the River Road to plaintiffs or to the public, in whose interests the Commission was primarily acting in making the order in question.

It is respectfully submitted that if it be assumed that appellant has any interest in this suit which would otherwise entitle it to intervene as a matter of right, that interest is being adequately represented by the defendants and hence appellant is not entitled to intervene as of right under Rule 24 (a) (2) of the Rules of Civil Procedure.

X.

NO STATUTE OF THE UNITED STATES GIVES THE APPELLANT AN UNCONDITIONAL RIGHT TO INTERVENE.

There remains to be noticed appellant's claim that two United States statutes give it an unconditional right to intervene (Br. p. 22–27).

Rule 24 (a) (1) of the Rules of Civil Procedure provides for intervention as of right "when a statute of the United States confers an unconditional right to intervene."

A.

Section 17 (11) of Part I of the Interstate Commerce Act Does Not Confer upon Appellant an Unconditional Right to Intervene.

Appellant insists that Section 17 (11) of Part I of the Interstate Commerce Act (49 U.S.C.A. Sec. 17 (11)) confers upon it an unconditional right to intervene, and that this section relates not only to proceedings before the Commission but to suits brought pursuant to the Act. Section 17 (11) provides:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

As originally enacted in 1887, Section 17 (24 Stat. 379, p. 395) related only to procedure before the Commission. It has been amended from time to time (25 Stat. 861 (1889); 40 Stat. 270 (1917); 41 Stat. 492 (1920); 47 Stat. 1368 (1933)) but, throughout these amendments, it has related exclusively to procedure before the Commission. The last amendment occurred in 1940 (54 Stat. 898 *et seq.*) and included, among other changes, addition of the provision above quoted. The Transportation Act of 1940, which carried this amendment, was a long measure making many amendments to the Interstate Commerce Act as a whole, but the subtitle, which preceded the amendments of Section 17, and which appears in the United States Code, read:

> "Commission procedure; delegation of duties; rehearings" (54 Stat. 898, 916).

Thus the subtitle of the amendatory act itself limits the scope of Section 17 (11) to proceedings before the Commission. Although it seems unnecessary, we may call attention to the reference to this amendment of Section 17 which is contained in H. R. Report No. 2832, 76th Congress, 3d Session, which

was a conference report on the Transportation Act of 1940. Discussing the action of the conference, it is said at page 72:

> "Section 13 of the House amendment rewrote section 17 of the Interstate Commerce Act *which deals with the administrative disposition of matters coming within the Commission's jurisdiction.* The revision included matter in sections 204 (e) and 205 (a) which contained provisions dealing with procedural matters under part II of the Interstate Commerce Act relating to motor-carrier proceedings. Such sections 204 (e) and 205 (a) were repealed. Among other things the revised section 17 provided for the assignment of work or functions to an individual commissioner, an examiner, or Board of examiners."

The question in any problem of statutory construction "is the intention of the enacting body," *U. S.* v. *Rosenblum Truck Lines*, 315 U.S. 50, 53, or, as has been frequently stated, "the intent of the law-maker is the law," *Jones* v. *Guaranty and Indemnity Co.*, 101 U.S. 622, 626. In arriving at the legislative intent, the title and subtitles, including section headings, *Maguire* v. *Commissioner*, 313 U.S. 1, 9, the whole Act and its parts in relation to each other, *White* v. *U.S.*, 305 U.S. 281, 286, and its legislative history, *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479, may be considered. As this Court said in *Harrison* v. *Northern Trust Co.* (p. 479):

> "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'"

In view of the foregoing considerations, there can be no doubt but that Congress intended that Section 17 (11) should relate only to proceedings before the Commission, and that intent is the law.

Moreover, even if paragraph (11) relates to suits in courts as well as to proceedings before the Commission, it does not give an unconditional right to intervene, which it must give if Rule

24 (a) (1) is to be held applicable. A representative of employees of a carrier cannot intervene under paragraph (11) by a mere showing it is such a representative; there must be a further showing that the procedure "affects such employees," or, in other words, that it affects the interests of the employees. To determine whether there is any such interest involved as to permit intervention, resort must be had to the decisions dealing with the question of interest in relation to the right to intervene. We have already shown that there is no such interest.

B.

28 U.S.C.A. Section 45a Does Not Confer upon Appellant an Unconditional Right to Intervene.

As previously noted, after its petition to intervene had been denied, the appellant sought to amend its petition by adding to it an allegation that 28 U. S. C. A. Section 45a gave it an unconditional right to intervene (R. 138). Section 45a is long and involved and is set forth in the Appendix hereto. It seems doubtful that it has any application to this suit since it is specified that the Attorney General shall have charge of the interests of the Government in the suits therein referred to, and that the Attorney General shall not dispose of or discontinue a suit over the objection of an intervener. The first proviso to the section clearly relates to suits in which the validity of an order of the Commission is involved. The second proviso, upon which appellant relies, has to do with suits "relating to action" of the Commission. This clause is ambiguous, but the most reasonable construction of it would seem to be that it refers to suits relating to the validity of the Commission's orders, to which suits the United States is a necessary party, 28 U. S. C. A. Section 46, *Lambert Co.* v. *Balt. & Ohio R. R. Co.*, 258 U.S. 377, and hence the reference to the control of the Attorney General over the suits after intervention.

This suit, of course, does not involve the validity of the order of the Commission which has heretofore been finally adjudicated. It is simply an action to compel obedience to the order. However, assuming that Section 45a is applicable to this suit, it only gives an unconditional right to intervene to the Interstate Commerce Commission and any party or parties in interest who were parties to a proceeding before the Commission in which the order was entered. No one else may intervene except upon leave given, "and leave can be granted only to one showing interest." *Chicago Junction Case*, 264 U. S. 258, 268. *Cf. Boston Towboat Co.* v. *U. S.*, 321 U. S. 632, 633, 634. So again the question would be presented as to what interest a party must show in order to be permitted to intervene, and to answer this question resort would have to be had to the general doctrines of intervention as set forth in the rules of court and the decided cases, already fully discussed.

It is therefore respectfully submitted that no statute of the United States gives the appellant an unconditional right to intervene.

If either of the statutes referred to by appellant is applicable to this procedure, such statute confers only a conditional right to intervene and the application based thereon must fall within Rule 24 (b) relating to "permissive intervention." But as previously pointed out, the appellant in the court below abandoned any claim to permissive intervention (R. 155).

CONCLUSION

Appellant's contention that it is entitled to intervene because it is an indispensable party is wholly without foundation. Its right to intervene depends entirely upon its having a direct interest in the subject matter of the suit which intervention is necessary to protect.

It is submitted that appellant has not shown that it has such an interest. Its claim of interest is based upon an alleged con-

tract with the River Road, performance of which would nullify the antecedent order of the Commission, which this suit seeks to enforce. If appellant is aggrieved by the order, it may sue in court to set it aside, or petition the Commission to modify it. It may not attack it in this suit.

Even if the appellant had a contract which was antecedent to the order of the Commission (which it does not have), the Congressional power exercised by the Commission under the Interstate Commerce Act is amply adequate to impair it.

Appellant has failed to show that those on whose behalf it seeks to intervene would sustain any loss through the enforcement of the Commission's order.

Even if appellant had a valid contract with the River Road, the existence of such a contract would not give it the right to intervene. The validity of such a contract would not be adjudicated in this suit. That would be a matter solely between the appellant and the River Road in which neither the plaintiffs nor the Commission have any concern.

The fact that injunctive relief is sought and has been granted against appellant's members as agents of the defendants does not establish appellant's right to intervene.

For all of the foregoing reasons the appellant lacks the interest in this suit necessary to entitle it to intervene as a matter of right.

Even if appellant had shown such an interest in its members as would otherwise entitle it to intervene as of right (which it has not done), it has failed to show that such interest is not or may not be adequately represented by the defendants.

No statute of the United States gives appellant an unconditional right to intervene. Section 17, paragraph 11, of Part I of the Interstate Commerce Act refers exclusively to proceed-

ings before the Commission, in addition to requiring an interest, and 28 U. S. C. A. Section 45a requires that an interest appear.

The court below did not err in denying the appellant's petition to intervene. The appeal should be dismissed or the order of the court below denying intervention affirmed.

Respectfully submitted,

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April 28, 1947

APPENDIX

Section 45a, Title 28 of United States Code Annotated provides as follows:

"§ 45a. (Judicial Code, sections 212, 213.) Special attorneys; participation by Interstate Commerce Commission; intervention. The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefore by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at

any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, and WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, and THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES.

ERNEST S. BALLARD,
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Chicago 3, Illinois,
Of Counsel

May 8, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, and WABASH RAILROAD COMPANY,
Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES.

On the hearing of this cause on May 6, 1947, one of the Justices suggested that the question whether the appellant union had been served with the preliminary injunction issued

in this cause might be important to a proper understanding of the questions raised in this Court.

We have therefore incorporated as an appendix to this brief a certificate of the Clerk of the court below which shows that according to the records of that court the preliminary injunction was not served on the appellant union, contrary to the statement we understood the attorneys for appellant to make to the Court on the hearing of this cause.

Until the question was raised on said hearing the matter was not deemed important. This was for the reason that the injunction does not run against the appellant union and could not be made to run against it through service of a copy upon it.

Respectfully submitted,

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120 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

May 8, 1947

Appendix

NORTHERN DISTRICT OF ILLINOIS
U.S. MARSHAL'S RETURN

Served this writ on the within named THE NEW YORK CENTRAL RAILROAD COMPANY, by delivering a copy thereof to S. C. Murray, General Counsel, an agent of said company this 14th day of March, A.D. 1946.
The President of said company not found in my district.

Served this writ on the within named THE CHICAGO RIVER & INDIANA R.R. COMPANY, by delivering a copy thereof to S. C. Murray, General Counsel, an agent of said company this 14th day of March, A.D. 1946.
The President of said company not found in my district.

WM. H. McDONNELL, U.S. MARSHAL, BY WM. RAFF DEPUTY

Served this writ on the within named CHICAGO JUNCTION RAILWAY COMPANY, by delivering a copy thereof to Winston, Strawn and Shaw, Attorneys, agents to accept service for CHICAGO JUNCTION RAILWAY COMPANY, by delivering said copy thereof to A. H. Straube, authorized agent to accept for said Winston, Strawn & Shaw, this 14th day of March, A.D. 1946. The President of CHICAGO JUNCTION RAILWAY COMPANY, not found in my district.

WM. H. McDONNELL, U.S. MARSHAL, by Peter Bianco, Deputy

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Appendix (cont.)

CERTIFIED COPY D. C. FORM NO. 30

United States of America
Northern District of Illinois } ss:

I, ROY H. JOHNSON, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original U. S. Marshal's Return attached to certified copy of an order for preliminary injunction entered March 14, 1946, in the matter of: THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Plaintiffs, vs. THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, et al., Defendants, INTERSTATE COMMERCE COMMISSION, INTERVENING PLAINTIFF, Civil No. 46 C 275, now remaining among the records of the said Court in my office, and

I DO HEREBY FURTHER CERTIFY that the records of said cause in my office, do not show a return of any other or further service of said order by the U. S. Marshal or otherwise.

(SEAL) IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 8th day of May, A.D. 1947

(Signed) ROY H. JOHNSON
Clerk.

By
Deputy Clerk.

AFFIDAVIT OF SERVICE

State of Illinois }
County of Cook } ss

ERNEST S. BALLARD, being first duly sworn, deposes and says that he has this day served a copy of the within and annexed supplemental brief upon appellant, Brotherhood of Railroad Trainmen, by placing a copy thereof in an envelope duly sealed, with postage prepaid, addressed to Burke Williamson and Jack Williamson, Attorneys for said appellant, at their office at 39 South La Salle Street, Chicago, Illinois, and depositing said envelope in the United States Postoffice, Federal Building, Chicago, Illinois; upon the intervening plaintiff-appellee, Interstate Commerce Commission, by mailing a copy thereof in the aforesaid manner to Harry L. Underwood, Attorney for said intervening plaintiff-appellee, at his office at 3341 Interstate Commerce Building, Washington, D. C.; upon the defendant-appellee Chicago Junction Railway Company by mailing a copy thereof in the aforesaid manner to Winston, Strawn & Shaw, Attorneys for said defendant-appellee, at 38 South Dearborn Street, Chicago, Illinois; and upon defendants-appellees The Chicago River and Indiana Railroad Company and The New York Central Railroad Company by mailing a copy thereof in the aforesaid manner to Sidney C. Murray, Attorney for said defendants-appellees, at 1236 La Salle Street Station, Chicago, Illinois.

(signed) ERNEST S. BALLARD

Subscribed and sworn to before
me this 8th day of May, 1947.

(signed) EVERETT A. GIBBS
Notary Public

My Commission expires August 27, 1948.

[seal]

p 1

SUPREME COURT OF THE UNITED STATES

No. 970.—October Term, 1946.

Brotherhood of Railroad Trainmen, an Unincorporated Association, Appellant, v. The Baltimore & Ohio Railroad Company, et al.	On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

[June 9, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

Our concern here is with the intervention rights of representatives of railroad employees in a suit brought against the railroad under § 16 (12) of the Interstate Commerce Act, 49 U. S. C. § 16 (12).

The origin of this suit is to be found in an order issued by the Interstate Commerce Commission on May 16, 1922. *Chicago Junction Case*, 71 I. C. C. 631. The Commission there approved the purchase by the New York Central Railroad Co. (Central) of all the capital stock of the Chicago River & Indiana Railroad Co. (River Road); it also authorized the leasing to River Road of all the properties of the Chicago Junction Railway Co. (Junction) for 99 years and thereafter, at the lessee's option, in perpetuity. Among the properties in question were trackage and switching facilities at the Union Stock Yards, Chicago, Illinois, connecting with various trunk lines. Prior to the Commission order, the practice had been for the trunk line railroads to use their own power and crews to move their empty and loaded livestock cars over these tracks to and from the loading places in the Union Stock Yards. For the privilege of so moving their cars, the railroads were charged $1.00 per car, loaded or empty.

See also Chicago Junction Case, 264 U.S. 258,

The Commission made various conditions to its approval of the proposed transactions. The third condition provided: "The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central." 71 I. C. C. at 639. This condition is still in effect, the Commission's decision and order having been found to be valid and binding on all parties in a proceeding in the District Court in 1929.[1]

The trunk line railroads have continued to use their own power and crews in moving their livestock cars over the trackage operated by River Road and have paid River Road the amount of $1.00 per car. But on January 25, 1946, Central and River Road notified the railroads that on and after February 1, 1946, the cars would be moved over this trackage by means of the power and crews of River Road and that the handling charge would be $12.96 per outbound loaded car. Soon after this new practice went into effect, the trunk line railroads (appellees herein) brought this suit for preliminary and permanent injunctions under § 16 (12) of the Interstate Commerce Act against Central, River Road and Junction. They claimed that the new practice was in violation of the third condition of the 1922 Commission order. They accordingly sought to enjoin the defendants and "their respective officers, agents, representatives, servants, employees and successors," from disobeying the order, especially the third condition thereof, and to force the defendants to permit them to move their cars with their own power and crews. The Commission was allowed to intervene as a party

[1] *Baltimore & O. R. Co.* v. *United States* (unreported), United States District Court for the Northern District of Illinois, Eastern Division, Equity No. 3427, January 15, 1929. The court approved the Commission order as amended in 150 I. C. C. 32. That amendment is not germane to this case.

plaintiff; its intervening complaint also prayed for an injunction against the alleged violation of the third condition by the defendants and their employees.[2]

A stipulation of facts was then filed. After describing the change in handling the cars, it pointed out that this change resulted from a settlement between the River Road and the Brotherhood of Railroad Trainmen of a labor dispute over the work involved in these livestock car movements. The Brotherhood was the bargaining agent under the Railway Labor Act for the River Road trainmen. It made a demand, based upon its contract with River Road, that these trainmen be given the work of moving and switching the livestock cars over the River Road trackage. The Brotherhood threatened to call a strike unless this demand was met before 10:30 p. m., January 23, 1946, a threat that was backed by an almost unanimous strike vote of the trainmen. Under this threat, River Road made an agreement with the Brotherhood shortly before the scheduled strike hour, as a result of which the River Road trainmen were to be permitted to move and switch the cars. The notice to the trunk line railroads of this change in practice subsequently followed.

The District Court thereupon issued a preliminary injunction as requested. Central, River Road and Junction, and "their respective officers, agents, representatives, employees and successors," were restrained from disobeying the 1922 Commission order and from violating the third condition of that order and were commanded to permit the trunk line railroads to move their cars over the River Road line with their own power and crews. The court concluded, as a matter of law, that the facts relative to

[2] The Commission based its complaint upon § 5 (8) of the Interstate Commerce Act, 49 U. S. C. § 5 (8), which authorizes the Commission to seek, and grants jurisdiction to the federal district courts to issue, injunctive or mandatory relief to restrain violation of or compel obedience to an order issued under § 5.

the labor dispute between the Brotherhood and River Road were "irrelevant and immaterial." [3]

Three days after the preliminary injunction became effective, the Brotherhood asked leave to file its special appearance for the purpose of moving to vacate the injunction and to dismiss the proceedings for failure to join the Brotherhood and its members as indispensable parties. This motion was denied. River Road then filed its answer to the original complaint, pointing out that the changed arrangement resulted from the labor dispute with the Brotherhood and contending that this new practice did not violate the 1922 Commission order. The Brotherhood thereafter filed its motion to intervene generally as a party defendant, alleging that the primary purpose of the suit was to nullify its agreement with River Road and to deprive the Brotherhood members of the work they were performing under that agreement and that the Brotherhood members were therefore indispensable parties. The contention was made that the Brotherhood had an unconditional right to intervene by virtue of § 17 (11) of the Interstate Commerce Act [4] and Rule 24 (a) (2) of the Federal Rules of Civil Procedure; and 28 U. S. C. § 45a was later added in support of this contention. But the motion to intervene was denied by order, without opinion.

The District Court then allowed an appeal to this Court from its order denying intervention. The appellee railroads moved to dismiss the appeal on the ground that such an order was not final and hence was not appealable, the Brotherhood not being entitled to intervene as a matter of right. We postponed further consideration of

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[3] On appeal by Junction, the Seventh Circuit Court of Appeals reversed the decree as to Junction, holding that Junction had no control over and nothing to do with the acts complained of by the appellees. *Baltimore & O. R. Co.* v. *Chicago Junction R. Co.*, 156 F. 2d 357.

[4] 54 Stat. 916, 49 U. S. C. § 17 (11).

the question of our jurisdiction to review the order to the hearing of the appeal upon the merits. 330 U. S. —.

Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States v. California Canneries*, 279 U. S. 553, 556.[8] The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. See *Pipe Line Co. v. United States*, 312 U. S. 502, 508.

Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other

[8] See also *Ex parte Cutting*, 94 U. S. 14; *Credits Commutation Co. v. United States*, 177 U. S. 311; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578; *In re Engelhard*, 231 U. S. 646; *City of New York v. Consolidated Gas Co.*, 253 U. S. 219; *New York City v. New York Telephone Co.*, 261 U. S. 312.

words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under § 16 (12) of the Interstate Commerce Act.

We start with Rule 24 (a) and (b) of the Federal Rules of Civil Procedure, applicable to a civil proceeding of this type. Rule 24 (a) deals with intervention of right and provides in pertinent part: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . ." In contrast, Rule 24 (b) is concerned with permissive intervention and reads as follows: "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The Brotherhood claims that as a consequence of either of two federal statutes—§ 17 (11) of the Interstate Commerce Act or 28 U. S. C. § 45a—it has an absolute right to intervene within the meaning of Rule 24 (a) (1). It also alleges that it possesses an absolute right within the contemplation of Rule 24 (a) (2), the representation of its interest by existing parties being inadequate and the possibility that it may be bound by a judgment in the action being a real one. No claim to permissive intervention under Rule 24 (b) is made; nor is there a contention that the District Court abused any discretion it might have had.

In our view, § 17 (11) of the Interstate Commerce Act does give the Brotherhood an absolute right to intervene in the instant proceeding within the meaning of Rule 24 (a) (1). As set forth in 54 Stat. 916,* this portion of the Act reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees." The following considerations make obvious the fact that the Brotherhood meets all the requirements of this provision:

First. It is unquestioned that the Brotherhood is the duly designated representative of the River Road trainmen.

Second. The right of intervention granted to such a representative by § 17 (11) applies to a court proceeding under § 16 (12) of the Act, the plain language of § 17 (11) extending its reach to "any proceeding arising under this Act."

On this point, however, the appellee railroads contend that § 17 (11) must be confined to proceedings before the Interstate Commerce Commission, to the exclusion of court proceedings. In support of this contention, they

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* As it appears in the United States Code, 49 U. S. C. § 17 (11), this paragraph reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

The words "this chapter" refer to Part I of the Interstate Commerce Act, which embodies the original statute known by that name prior to its division into parts. Chapter 8 relates to Part II of the Interstate Commerce Act, originally known as the Motor Carrier Act of 1935. Section 305 (h) of Part II is a cross-reference to § 17 of Part I: "All the provisions of section 17 of this title shall apply to all proceedings under this chapter." Chapter 12 is the equivalent of Part III of the Interstate Commerce Act, which deals with water carriers. Section 916 (a) is also a cross-reference to § 17 of Part I: "The provisions of section 12 and section 17 of chapter 1 of this title and sections 46–48 of this title shall apply with full force and effect in the administration and enforcement of this chapter."

point to the fact that § 17 as a whole is primarily concerned with Commission procedure and organization. That fact is emphasized by the heading of § 17 as it appears in the Statutes at Large, 54 Stat. 913, and the United States Code, 49 U. S. C. § 17, a heading that reads: "Commission procedure; delegation of duties; rehearings." The inference is then made that paragraph (11), with which we are concerned, must be limited by that heading and by the general context of § 17 as a whole. The result of the contention is that the phrase "any proceeding arising under this Act," as found in paragraph (11), is rewritten by construction to refer only to "any proceeding before the Commission arising under this section."

We cannot sanction such a construction of these words. It is true, of course, that § 17 is concerned primarily with the organization of the Commission and its subdivisions and with the administrative disposition of matters coming within that agency's jurisdiction. At least ten of the twelve paragraphs of § 17 deal with those matters. And before § 17 was cast into its present form in 1940, all five of its paragraphs related exclusively to those matters. Congress rewrote the section when it enacted the Transportation Act of 1940, 54 Stat. 898, continuing and modifying previous provisions and consolidating and including matters which had formerly been scattered throughout the Act.[7] At the same time, however, it was expressly recognized that certain paragraphs were being added which were entirely new, paragraphs which went beyond purely administrative matters. Thus the pertinent committee reports stated[8] that "A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial re-

[7] H. Rep. No. 1217, 76th Cong., 1st Sess., p. 13; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

[8] H. Rep. No. 2016, 76th Cong., 3d Sess., p. 67; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

view as in the case of full Commission orders, after an application for rehearing has been made and acted upon." And as to paragraph (11), it was said [9] that "A new paragraph is added at the end of section 17 providing that representatives of employees of a carrier may intervene and be heard in any proceedings arising under part I affecting such employees." By such language in their reports, the framers of § 17 recognized the obvious fact that certain provisions of that section deal with something more than might be indicated by the heading.

That the heading of § 17 fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved. While accurately referring to the subjects of Commission procedure and organization, it neglects to reveal that § 17 also deals with judicial review of administrative orders and with intervention by employee representatives. But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *United States* v. *Fisher*, 2 Cranch 358, 386; *Cornell* v. *Coyne*, 192 U. S. 418, 430; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 354. For interpretative purposes, they are of use only when they shed light on some ambig-

[9] H. Rep. No. 1217, 76th Cong., 1st Sess., p. 15.

uous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Here the meaning of § 17 (11) is unmistakable on its face. There is a simple, unambiguous reference to "any proceeding arising under this Act" or, as the House committee paraphrased it,[10] to "any proceedings arising under part I." There is not a word which would warrant limiting this reference so as to allow intervention only in proceedings arising under § 17 or in proceedings before the Commission. The proceedings mentioned are those which arise under this Act, an Act under which both judicial and administrative proceedings may arise.[11] The instant case is a ready illustration of a judicial proceeding arising under this Act; a suit of this nature is authorized solely by § 16 (12) of the Act.[12] Hence it is a proceeding to which the right of intervention may attach by virtue of § 17 (11).

Nor do we perceive any reason of statutory policy why the framers of § 17 (11) should have wished to confine the right of intervention by employee representatives to proceedings before the Commission. Occasions may arise, as in this case, where the employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both types of proceedings, we would be un-

[10] H. Rep. No. 1217, 76th Cong., 1st Sess., p. 15.

[11] Section 17 (11), by referring to proceedings arising under "this Act," also affects judicial and administrative proceedings arising under Parts II and III of the Act. See note 6, *supra*.

[12] Section 16 (12) is labeled "Proceedings to enforce orders other than for payment of money." 49 U. S. C. § 16 (12). It provides that if any carrier fails to obey a Commission order other than for the payment of money, the Commission, any injured party or the United States may apply to a federal district court for the enforcement of the order.

justified in formulating some policy which they did not see fit to express to limit that language in any way.

Third. This is a proceeding arising under the Act which affects the employees represented by the Brotherhood. Nothing could make this plainer than the fact that direct injunctive relief was sought and obtained against these employees. The appellee railroads sued to enjoin River Road and its employees from disobeying the third condition of the 1922 Commission order. It was alleged that this condition required River Road and its employees to permit the railroads to use their own power and crews in moving cars over the River Road line. Yet that was precisely the subject matter of the conflict between River Road and the Brotherhood, resulting in the insertion of important provisions in the contract between them. If the Commission order did require the River Road employees to forego operating the livestock cars, their contract rights with River Road were affected in a very real sense. Acts done by the employees in performance of this contract obviously prompted this suit; and any such acts performed after the issuance of an injunction might give rise to contempt action. It is thus impossible to say that this proceeding is not one "affecting such employees" within the meaning of § 17 (11).

Since all the conditions of § 17 (11) have been satisfied in this case, the only question that remains is whether the Brotherhood is thereby accorded a permissive or an absolute right to intervene. The language of § 17 (11) is in terms of "may intervene and be heard," which might be construed as giving only a discretionary right. But our view, as we have indicated, is that once the requirements of § 17 (11) have been met, the employees' representative acquires an absolute right of intervention.

Some statutes speak of intervention "as of right." Thus where suit is brought by or against the United States to enforce or set aside a Commission order, the Commission or the parties in interest to the proceeding before

the Commission "may appear as parties thereto . . . as of right." 28 U. S. C. § 45a. In such a case, the right to intervene is absolute and unconditional. *Sprunt & Son* v. *United States*, 281 U. S. 249, 255.

No less absolute or unconditional is the right to intervene under § 17 (11), which permits intervention where the employees are affected by the proceeding. To be sufficiently affected within the meaning of this provision requires that the employees be prejudiced or bound by any judgment that might be entered in the case, as is the situation relative to the River Road employees. Once it is clear that an effect of that degree is present, however, there is no room for the operation of a court's discretion. Whether the employees' interests should be asserted or defended in a proceeding where those interests are at stake is a question to be decided by the employees' representative, not by the court. The statutory term "may intervene" thus means "may intervene if the employees' representative so chooses" rather than "may intervene in the discretion of the court." And if the representative does choose to intervene, it may do so as a matter of right within the meaning of Rule 24 (a) (1) of the Federal Rules of Civil Procedure. Such is this case.

We thus conclude that § 17 (11) gives the Brotherhood an absolute right to intervene in this proceeding, making it unnecessary to discuss whether, and to what extent, the Brotherhood would have had such a right apart from § 17 (11). It follows that we have jurisdiction to consider the appeal on its merits. And in the exercise of that jurisdiction, we reverse the judgment of the District Court denying leave to the Brotherhood to intervene.

Reversed.